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Attorneys for Defendant  
OnStar, LLC

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

KATHRYN M. ROBINSON,  
individually and on behalf of all others  
similarly situated,

Plaintiff,

v.

ONSTAR, LLC and DOES 1 through  
50, inclusive,

Defendant.

Case No. **'15CV1731 WQHBGS**

**DECLARATION OF KENNETH K. LEE  
IN SUPPORT OF REMOVAL  
PURSUANT TO  
28 U.S.C. §§ 1331, 1332(d), and 1446**

1 I, Kenneth K. Lee, hereby declare as follows:

2 1. I am a lawyer with the law firm of Jenner & Block LLP, counsel for  
3 Defendant OnStar, LLC ("OnStar") in the above-captioned action. I am a member in  
4 good standing of the State Bar of California. I make this declaration in support of  
5 Defendant's removal of action pursuant to 28 U.S.C. §§ 1331, 1332(d), and 1446.

6 2. A true and correct copy of the Summons and Complaint served on OnStar  
7 and filed by Plaintiff Kathryn M. Robinson in the Superior Court of the State of California  
8 in and for the County of San Diego on July 2, 2015 is attached hereto as Exhibit A.

9 3. A true and correct copy of the Notice of Service of Process indicating service  
10 on Corporation Service Company, OnStar's registered agent for service of process in  
11 California, on July 6, 2014 is attached hereto as Exhibit B.

12 4. A true and correct copy of the Order Granting Plaintiffs' Motion for  
13 Attorney's Fees and Reimbursement of Expenses, July 27, 2015, in the matter captioned  
14 *Tait v. BSH Home Appliances Corp.* in the United States District Court for the Central  
15 District of California is attached hereto as Exhibit C.

16  
17 I swear under penalty of perjury under the laws of the United States and California  
18 that the foregoing is true and correct to the best of my knowledge.

19 Executed in Los Angeles, California.

20  
21 Dated: August 4, 2015

JENNER & BLOCK LLP

22  
23 By: /s/ Kenneth K. Lee  
KENNETH K. LEE

24  
25 Attorneys for Defendant  
OnStar, LLC  
26  
27  
28

## **EXHIBIT A**

SUM-100

# SUMMONS (CITACION JUDICIAL)

## NOTICE TO DEFENDANT: (AVISO AL DEMANDADO):

ONSTAR, LLC and DOES 1 through 50, inclusive.

## YOU ARE BEING SUED BY PLAINTIFF: (LO ESTÁ DEMANDANDO EL DEMANDANTE):

KATHRYN M. ROBINSON, individually and on behalf of all others similarly situated.

FOR COURT USE ONLY  
(SOLO PARA USO DE LA CORTE)ELECTRONICALLY FILED  
Superior Court of California,  
County of San Diego

07/02/2015 at 01:01:07 PM

Clerk of the Superior Court  
By Rachel Harmon, Deputy Clerk

**NOTICE!** You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read the information below.

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center ([www.courtinfo.ca.gov/selfhelp](http://www.courtinfo.ca.gov/selfhelp)), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site ([www.lawhelpcalifornia.org](http://www.lawhelpcalifornia.org)), the California Courts Online Self-Help Center ([www.courtinfo.ca.gov/selfhelp](http://www.courtinfo.ca.gov/selfhelp)), or by contacting your local court or county bar association. **NOTE:** The court has a statutory lien for waived fees and costs on any settlement or arbitration award of \$10,000 or more in a civil case. The court's lien must be paid before the court will dismiss the case. **¡AVISO!** Lo han demandado. Si no responde dentro de 30 días, la corte puede decidir en su contra sin escuchar su versión. Lea la información a continuación.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California ([www.sucorte.ca.gov](http://www.sucorte.ca.gov)), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, ([www.lawhelpcalifornia.org](http://www.lawhelpcalifornia.org)), en el Centro de Ayuda de las Cortes de California, ([www.sucorte.ca.gov](http://www.sucorte.ca.gov)) o poniéndose en contacto con la corte o el colegio de abogados locales. **AVISO:** Por ley, la corte tiene derecho a reclamar las cuotas y los costos exentos por imponer un gravamen sobre cualquier recuperación de \$10,000 ó más de valor recibida mediante un acuerdo o una concesión de arbitraje en un caso de derecho civil. Tiene que pagar el gravamen de la corte antes de que la corte pueda desechar el caso.

The name and address of the court is:  
(El nombre y dirección de la corte es):

SAN DIEGO SUPERIOR COURT  
330 W. Broadway, San Diego, CA 92101

CASE NUMBER:  
(No. 37-2015-00022176-CU-BT-CTL

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:

(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

Stuart M. Eppsteiner, Eppsteiner & Fiorica, 12555 High Bluff Dr., Ste. 155, SD, CA 92130 -Tel: 858.350.1500

DATE: 07/06/2015  
(Fecha)

Clerk, by  
(Secretario)

R. Harmon  
R. Harmon

, Deputy  
(Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)

(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).

## NOTICE TO THE PERSON SERVED: You are served

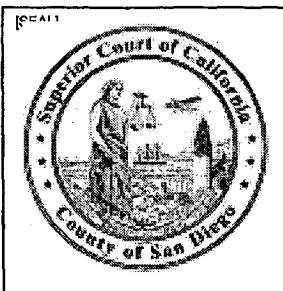
- ☐ as an individual defendant.
- ☐ as the person sued under the fictitious name of (specify):

- ☒ on behalf of (specify): **Onstar, LLC**

- under: ☐ CCP 416.10 (corporation) ☐ CCP 416.60 (minor)  
☐ CCP 416.20 (defunct corporation) ☐ CCP 416.70 (conservatee)  
☐ CCP 416.40 (association or partnership) ☐ CCP 416.90 (authorized person)

☒ other (specify): **a limited liability company**

- ☐ by personal delivery on (date):



CM-010

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): <b>Stuart M. Eppsteiner (SBN: 098973)</b> <b>Eppsteiner &amp; Fiorica Attorneys, LLP</b> <b>12555 High Bluff Drive, Suite 155</b> <b>San Diego, CA 92130</b> TELEPHONE NO.: <b>858.350.1500</b> FAX NO.: <b>858.350.1501</b> ATTORNEY FOR (Name): <b>Kathryn M. Robinson</b>		<b>FOR COURT USE ONLY</b>  <b>ELECTRONICALLY FILED</b> Superior Court of California, County of San Diego  <b>07/02/2015 at 01:01:07 PM</b>  Clerk of the Superior Court By Rachel Harmon, Deputy Clerk						
<b>SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Diego</b> STREET ADDRESS: <b>330 W. Broadway</b> MAILING ADDRESS: CITY AND ZIP CODE: <b>San Diego, CA 92101</b> BRANCH NAME: <b>Central - Hall of Justice</b>								
CASE NAME: <b>Kathryn M. Robinson v. Onstar, LLC</b>								
<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td colspan="2" style="text-align: center;"><b>CIVIL CASE COVER SHEET</b></td> <td style="text-align: center;"><b>Complex Case Designation</b></td> </tr> <tr> <td style="width: 50%; vertical-align: top;"> <input checked="" type="checkbox"/> <b>Unlimited</b>            (Amount demanded exceeds \$25,000)         </td> <td style="width: 50%; vertical-align: top;"> <input type="checkbox"/> <b>Limited</b>            (Amount demanded is \$25,000 or less)         </td> <td style="vertical-align: top;"> <input type="checkbox"/> <b>Counter</b>    <input type="checkbox"/> <b>Joinder</b>            Filed with first appearance by defendant            (Cal. Rules of Court, rule 3.402)         </td> </tr> </table>			<b>CIVIL CASE COVER SHEET</b>		<b>Complex Case Designation</b>	<input checked="" type="checkbox"/> <b>Unlimited</b> (Amount demanded exceeds \$25,000)	<input type="checkbox"/> <b>Limited</b> (Amount demanded is \$25,000 or less)	<input type="checkbox"/> <b>Counter</b> <input type="checkbox"/> <b>Joinder</b> Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)
<b>CIVIL CASE COVER SHEET</b>		<b>Complex Case Designation</b>						
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Items 1-6 below must be completed (see instructions on page 2).

1. Check **one** box below for the case type that best describes this case:

<b>Auto Tort</b> <input type="checkbox"/> Auto (22) <input type="checkbox"/> Uninsured motorist (46) <b>Other PI/PD/W/D (Personal Injury/Property Damage/Wrongful Death) Tort</b> <input type="checkbox"/> Asbestos (04) <input type="checkbox"/> Product liability (24) <input type="checkbox"/> Medical malpractice (45) <input type="checkbox"/> Other PI/PD/W/D (23) <b>Non-PI/PD/W/D (Other) Tort</b> <input checked="" type="checkbox"/> Business tort/unfair business practice (07) <input type="checkbox"/> Civil rights (08) <input type="checkbox"/> Defamation (13) <input type="checkbox"/> Fraud (16) <input type="checkbox"/> Intellectual property (19) <input type="checkbox"/> Professional negligence (25) <input type="checkbox"/> Other non-PI/PD/W/D tort (35) <b>Employment</b> <input type="checkbox"/> Wrongful termination (36) <input type="checkbox"/> Other employment (15)	<b>Contract</b> <input type="checkbox"/> Breach of contract/warranty (06) <input type="checkbox"/> Rule 3.740 collections (09) <input type="checkbox"/> Other collections (09) <input type="checkbox"/> Insurance coverage (18) <input type="checkbox"/> Other contract (37) <b>Real Property</b> <input type="checkbox"/> Eminent domain/inverse condemnation (14) <input type="checkbox"/> Wrongful eviction (33) <input type="checkbox"/> Other real property (26) <b>Unlawful Detainer</b> <input type="checkbox"/> Commercial (31) <input type="checkbox"/> Residential (32) <input type="checkbox"/> Drugs (38) <b>Judicial Review</b> <input type="checkbox"/> Asset forfeiture (05) <input type="checkbox"/> Petition re: arbitration award (11) <input type="checkbox"/> Writ of mandate (02) <input type="checkbox"/> Other judicial review (39)	<b>Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 3.400-3.403)</b> <input type="checkbox"/> Antitrust/Trade regulation (03) <input type="checkbox"/> Construction defect (10) <input type="checkbox"/> Mass tort (40) <input type="checkbox"/> Securities litigation (28) <input type="checkbox"/> Environmental/Toxic tort (30) <input type="checkbox"/> Insurance coverage claims arising from the above listed provisionally complex case types (41) <b>Enforcement of Judgment</b> <input type="checkbox"/> Enforcement of judgment (20) <b>Miscellaneous Civil Complaint</b> <input type="checkbox"/> RICO (27) <input type="checkbox"/> Other complaint (not specified above) (42) <b>Miscellaneous Civil Petition</b> <input type="checkbox"/> Partnership and corporate governance (21) <input type="checkbox"/> Other petition (not specified above) (43)
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2. This case ☒ is ☐ is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:
- |  |   |
|--|---|
| a. <input type="checkbox"/> Large number of separately represented parties<br>b. <input checked="" type="checkbox"/> Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve<br>c. <input checked="" type="checkbox"/> Substantial amount of documentary evidence | d. <input type="checkbox"/> Large number of witnesses<br>e. <input type="checkbox"/> Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court<br>f. <input checked="" type="checkbox"/> Substantial postjudgment judicial supervision |
|--|---|
3. Remedies sought (check all that apply): a. ☒ monetary    b. ☒ nonmonetary; declaratory or injunctive relief    c. ☐ punitive
4. Number of causes of action (specify): **4**
5. This case ☒ is ☐ is not a class action suit.
6. If there are any known related cases, file and serve a notice of related case. (You may use form CM-015.)

Date: **July 2, 2015**  
**Stuart M. Eppsteiner**

(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

**NOTICE**

- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.

Page 1 of 2

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**ELECTRONICALLY FILED**  
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County of San Diego  
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Clerk of the Superior Court  
By Rachel Harmon, Deputy Clerk

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10 F: 415-546-6801

11 Counsel for Plaintiff and the Putative Class

12  
13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
14 **COUNTY OF SAN DIEGO**

15  
16 KATHRYN M. ROBINSON,  
individually and on behalf of all others  
17 similarly situated,

18 PLAINTIFF,

19 vs.

20 ONSTAR, LLC and DOES 1 through 50,  
inclusive,

21 DEFENDANTS.  
22  
23  
24  
25  
26  
27  
28

CASE NO.: 37-2015-00022176-CU-BT-CTL

**CLASS ACTION COMPLAINT  
FOR:**

- 1) VIOLATIONS OF THE  
ELECTRONIC FUNDS  
TRANSFER ACT, 15 U.S.C. §§  
1693 *et seq.*
- 2) VIOLATIONS OF THE  
AUTOMATIC RENEWAL  
LAW, BUS. & PROF. CODE  
§§ 17600 *et seq.*
- 3) UNLAWFUL BUSINESS  
PRACTICES UNDER BUS. &  
PROF. CODE §§ 17200 *et seq.*
- 4) UNFAIR BUSINESS  
PRACTICES UNDER BUS. &  
PROF. CODE §§ 17200 *et seq.*

[Demand For Jury Trial]

1 Plaintiff Kathryn M. Robinson, by and through her undersigned counsel,  
2 individually and on behalf of all others similarly situated, alleges facts and claims  
3 upon personal knowledge and information and belief as follows:

#### 4 INTRODUCTION

5 1. This complaint challenges the unlawful and unfair conduct of OnStar  
6 LLC (“OnStar” or “Defendant”) in connection with its OnStar Telematics Service  
7 (“OTS”). OnStar takes money from consumers’ bank and credit card accounts  
8 without obtaining the legally-required written authorization and/or express informed  
9 consent from the consumers. Specifically, OnStar surreptitiously obtains  
10 consumers’ debit and credit card account numbers, and then takes up to \$34.99 per  
11 month through electronic funds transfers from consumers’ bank accounts and  
12 through charges to consumers’ credit cards, all without authorization. By so doing,  
13 OnStar reaps millions of dollars in unlawfully-obtained revenues.

14 2. OnStar took money for three months from Plaintiff Robinson’s  
15 checking account via electronic fund transfers using her debit card, even though  
16 OnStar never obtained either her express consent or her written authorization to take  
17 money from her bank account for OTS. OnStar’s conduct violates numerous state  
18 and federal regulations, including the Electronic Funds Transfer Act (15 U.S.C. §§  
19 1693 *et seq.*), the Automatic Renewal Law (Bus. & Prof. Code §§ 17600 *et seq.*),  
20 and the Unfair Competition Law (Bus. & Prof. Code §§ 17200 *et seq.*).

21 3. This action seeks damages and restitution, as well as declaratory and  
22 injunctive relief to ensure the illegal practices do not recur and that OnStar, in the  
23 future, obtains express consent from consumers for preauthorized electronic funds  
24 transfers and credit card charges, as required by law.

#### 25 THE PARTIES

26 4. Plaintiff Kathryn Robinson is a citizen of California and resides in San  
27 Diego, California.



1           5. Defendant OnStar, LLC is a Delaware limited liability company and  
2 maintains its principal place of business at 400 Renaissance Center, Detroit,  
3 Michigan 48265.

4           6. At all times relevant herein, OnStar, LLC has been, and is, a fully  
5 owned subsidiary of General Motors LLC, a Delaware Limited Liability Company  
6 with its principal place of business in Detroit, Michigan.

7           7. The true names and capacities of Defendants sued herein under Code of  
8 Civil Procedure section 474 as Does 1 through 50, inclusive, are presently unknown  
9 to Plaintiff, who therefore sues these Defendants by fictitious names. Plaintiff will  
10 amend this Complaint to state the Doe Defendants' true names and capacities after  
11 Plaintiff knows them. Each of the Doe Defendants is legally responsible in some  
12 manner for the conduct alleged herein.

13           8. At all times mentioned in the causes of action alleged herein, each and  
14 every Defendant, expressly including the unnamed Doe Defendants, was an agent  
15 and/or employee of each and every other Defendant. In doing the things alleged in  
16 this Complaint, each and every Defendant, including all Doe Defendants, was acting  
17 within the course and scope of their agency or employment and was acting with the  
18 consent, permission, and authorization of each of the remaining Defendants. All  
19 actions of each Defendant, as alleged in this Complaint, were ratified and approved  
20 by every other Defendant or its authorized officers or managing agents. The terms  
21 "OnStar" and "Defendant," as used herein, include the Doe Defendants.

22           9. Defendants, including the Doe Defendants, share the same officers and  
23 directors. In these capacities, the officers and directors of one entity comprise the  
24 majority of the other entities' boards of directors, which control and dictate  
25 Defendants' policies and practices.

26           10. As a consequence of the facts pleaded herein, there exists at all relevant  
27 times, a unity of interest in ownership between Defendants. These relationships are  
28 such that any individuality and separateness between all Defendants, has never



1 existed and does not exist now. Plaintiff is informed and believes, and based thereon  
2 alleges, that Defendants are each alter egos of one another, are agents or principals  
3 in agency-principal relationships with one another, and are successors or  
4 predecessors of each other and, based thereon, are liable for the acts and omissions  
5 of each other. These alter ego, agent-principal, and successor and predecessor  
6 relationships should be recognized to prevent an injustice to Plaintiff and the Classes  
7 described herein.

### 8 JURISDICTION AND VENUE

9 11. This Court has subject matter jurisdiction over this action pursuant to  
10 Article VI, section 10 of the California Constitution because this action is a cause  
11 not given by statute to other trial courts, and seeks (among other relief) a permanent  
12 injunction. Subject matter jurisdiction is further premised on, *inter alia*, the Unfair  
13 Competition Law (Bus. & Prof. Code §17203), and the Electronic Funds Transfer  
14 Act (15 U.S.C. §§ 1693 *et seq.*), which provides that “any action under this section  
15 may be brought in any ... court of competent jurisdiction ....” *Id.* § 1693m(g).

16 12. This court has personal jurisdiction over the defendants in this action  
17 because the defendants do sufficient business in California and have sufficient  
18 minimum contacts in California to render the exercise of personal jurisdiction over  
19 them by California courts consistent with traditional notions of fair play and  
20 substantial justice.

21 13. Venue is proper in this Court because Plaintiff Robinson resides in San  
22 Diego County and because a substantial part of the events or omissions giving rise to  
23 Plaintiff Robinson’s claims and to defendants’ liability took place within this  
24 county.

25 ///

26 ///

27 ///

28 ///

## FACTUAL BACKGROUND

### About OnStar

14. OnStar utilizes wireless telecommunications, satellite, vehicular, and computer technologies to provide OTS, which includes a connection to emergency assistance and access to OnStar hands-free calling and navigation services. OTS calling services are routed on third-party cellular networks from AT&T. OnStar resells AT&T cellular network minutes ("Minutes"), and provides navigation services and a connection to emergency assistance to free OTS registrants ("Registrants") and to subscribers who are charged for OTS ("Subscribers").

15. Consumers who want to accept a free initial period of OTS must register their vehicles' OTS equipment with OnStar. The initial free period can last for several months or up to one year. Registration is achieved by pressing the blue OnStar button on the rearview mirror in a vehicle that has OTS equipment. This action initiates a cellular telephone call to a live OnStar agent. Registration can also be achieved by calling OnStar's toll-free number or through OnStar's website. Registration takes only a few minutes.

16. Once the free period of OTS is concluded, Registrants who wish to continue to have access to OTS must pay a monthly fee and become Subscribers. Subscribers pay between \$19.99 and \$34.99 per month for different levels of OTS.

17. OTS equipment and software comes installed in most General Motors-manufactured vehicles, such as Chevrolet, Buick, and Cadillac brand vehicles. OTS is also available as an aftermarket product and service by installing OnStar For My Vehicle (FMV) in any vehicle. OnStar FMV is a rearview mirror with equipment, hardware, and software that can be installed in any vehicle to access OTS.

OnStar has approximately 6 million active United States Subscribers. California's population is approximately twelve percent of the United States population, per U.S. Census data. Plaintiff therefore estimates there are approximately seven hundred twenty thousand (720,000) persons in California who became Registrants. Based on

1 financial analyst estimates, OnStar converts approximately 50% of Registrants into  
2 paying Subscribers. Based thereon, Plaintiff estimates there are three hundred sixty  
3 thousand (360,000) California OnStar Subscribers.

4 **Plaintiff's OnStar Experience**

5 18. On or about December 15, 2013, Plaintiff and her husband, Scott  
6 Robinson, visited Hoehn Buick GMC Cadillac in Carlsbad, California, where Scott  
7 Robinson leased a new 2014 Cadillac ATS sedan (VIN# 1G6AA5RX0E0103492)  
8 (the "Vehicle").

9 19. Plaintiff has a community property ownership interest in the Vehicle  
10 lease agreement, and is the person who primarily operates the Vehicle. Plaintiff and  
11 her husband use the Vehicle for personal, not business, purposes.

12 20. The Vehicle, as leased, was outfitted with the equipment and software  
13 to access OTS and came with a one-year period of free OTS.

14 21. The Vehicle dealer told Plaintiff Robinson that to activate the one year  
15 of free OTS, she would have to register the Vehicle with OnStar from inside the  
16 Vehicle.

17 22. On or about December 17, 2013, Plaintiff pressed the blue OnStar  
18 button located on the Vehicle's rearview mirror, thereby initiating a cellular  
19 telephone call to OnStar, and was connected to a live OnStar agent. Plaintiff  
20 registered the Vehicle to receive free OTS. At no time during Plaintiff's registration  
21 call with OnStar did the OnStar agent mention there were any terms or conditions to  
22 receive free OTS, nor did the agent read or refer to any terms or conditions to  
23 receive OTS.

24 23. At no time during the call did Plaintiff enter into an agreement with  
25 OnStar to pay for OTS after the one-year free OTS period expired.

26 24. During the call, the OnStar agent advertised the sale of Minutes that  
27 would allow Plaintiff to make telephone calls using OTS instead of using her own  
28 cellular telephone. In the parlance of the Federal Trade Commission, this is known

1 as “upselling.” *See* 12 C.F.R. § 310.2(ee). The OnStar agent expressly advertised  
2 that Plaintiff would be able to make a call through OTS even if her own cellular  
3 telephone were unable to establish a connection with a cellular network.

4 25. Plaintiff understood from the OnStar agent that OTS would enable her  
5 to make a call when her own cellular telephone was out of range of, or unable to  
6 connect to, her carrier’s cellular network. Plaintiff agreed to purchase 60 Minutes  
7 for a cost of \$5.47, and provided her Bank of America debit card account number to  
8 the OnStar agent during this registration call.

9 26. At no time prior to her purchase of Minutes did OnStar convey to  
10 Plaintiff, orally or in writing, that any terms or conditions were associated with  
11 registering for free OTS or for purchasing Minutes.

12 27. At no time did Plaintiff sign any agreement nor did she orally agree to  
13 any terms or conditions with OnStar for OTS. At no time did Plaintiff agree to  
14 arbitrate any claims against OnStar.

15 28. At no time did Plaintiff agree to waive her right to file litigation against  
16 OnStar that sought class action treatment or her right to serve as a class  
17 representative in a class action lawsuit in which OnStar was a defendant.

18 29. At no time was Plaintiff informed by OnStar that to receive free OTS  
19 she was required to agree to pay for OTS after the free OTS terminated.

20 30. At no time did Plaintiff agree to the “automatic renewal” of OTS or the  
21 delivery of OTS by “continuous service.” (“[A]utomatic renewal” as used herein  
22 has the meaning stated in Bus. & Prof. Code § 17601(a) and “continuous service” as  
23 used herein has the meaning stated in Bus. & Prof. Code § 17601(e).)

24 31. At no time relevant hereto did OnStar obtain express written  
25 authorization from Plaintiff to have money debited from her bank account, by any  
26 means, to pay for OTS.

27 32. Plaintiff Robinson did not voluntarily provide any written or oral  
28 permission, authorization or consent for OnStar or any of its affiliates to collect any

1 subscription charges for OTS, automatic renewal of OTS, or continuous service of  
2 OTS.

3 33. On December 17, 2014, OnStar took \$29.90 from Plaintiff's bank  
4 account using her debit card account number.

5 34. In January 2015 and again in February 2015, OnStar took \$29.90 from  
6 Plaintiff's bank account via her debit card.

7 35. Upon noticing the charges for the first time in March 2015, Plaintiff  
8 immediately called OnStar and instructed it to stop taking money from her bank  
9 account and to cancel her OnStar account.

10 36. OnStar has not refunded Plaintiff Robinson any part of the \$89.70 that  
11 it took, without agreement or authorization, from her bank account via her debit  
12 card.

13 37. OnStar actually and proximately caused Plaintiff Robinson's injury in  
14 that Plaintiff Robinson would not have had \$89.70 taken from her bank account via  
15 her debit card but for OnStar's illegal, unlawful and unfair practices.

16 **OnStar's Similar Dealings With Consumers Across the U.S.**

17 38. Plaintiff Robinson's experience with OnStar was not an isolated  
18 incident. OnStar engages in a nationwide practice of surreptitiously obtaining  
19 consumers' debit and credit card numbers, either by requiring consumers to become  
20 Registrants for free OTS, for purposes of upselling Minutes to consumers, or by  
21 other means unknown to Plaintiff. Then, without obtaining the consumers' written  
22 authorization or express informed consent, OnStar charges Registrants' debit and  
23 credit cards up to \$34.99 every month for purported OTS services. This conduct  
24 violates numerous laws, as detailed below, and is also unfair and substantially  
25 injures consumers.

26 39. Consumer websites disclose hundreds of complaints about OnStar's  
27 practices that are similar to OnStar's treatment of Plaintiff Robinson. The following  
28 is a sampling of such complaints:

Source of Complaint	Content of Complaint
<p data-bbox="305 365 721 443"><a href="http://www.consumeraffairs.com/automotive/onstar.html">http://www.consumeraffairs.com/automotive/onstar.html</a></p> <p data-bbox="305 478 691 516">By Robert of Bedford, MA</p> <p data-bbox="305 562 526 600">Posted: 5/12/15</p> <p data-bbox="305 646 607 684">Retrieved: 5/26/2015</p>	<p data-bbox="753 365 1507 684">“I had my Credit Card billed by OnStar. I never signed up or want their service. How did they get my Credit Card number? That is scary. OnStar could somehow get my card number without me giving it to them. My only contact with them has been a call from them and I told refused their service. OnStar committed fraud by somehow obtaining my Card number.”</p>
<p data-bbox="305 756 721 833"><a href="http://www.consumeraffairs.com/automotive/onstar.html">http://www.consumeraffairs.com/automotive/onstar.html</a></p> <p data-bbox="305 869 669 907">By Brian of Kearney, NE</p> <p data-bbox="305 953 526 991">Posted: 2/21/15</p> <p data-bbox="305 1037 574 1075">Retrieved: 5/26/15</p>	<p data-bbox="753 756 1500 1163">“OnStar charged my credit card without my permission or any notification for 4 months. I noticed the charge on my account for this month. Called them and they would only refund half the charges. This is a very shady way to operate a business. They got my credit card number when I opened my account when I purchased a 2014 Chevy Silverado. They charged me a 2 or 3 dollars for a phone service that I could use through the OnStar in my truck.”</p>
<p data-bbox="305 1230 721 1308"><a href="http://www.consumeraffairs.com/automotive/onstar.html">http://www.consumeraffairs.com/automotive/onstar.html</a></p> <p data-bbox="305 1344 685 1421">By James of Spotsylvania, VA</p> <p data-bbox="305 1467 565 1505">Posted: 2/10/2015</p> <p data-bbox="305 1551 574 1589">Retrieved: 5/26/15</p>	<p data-bbox="753 1230 1507 1881">“So we get a ‘free trial’. We never agreed to pay anything... We cancel before (I repeat, before) the free trial expired. They then bill us anyways and take funds from our bank without authorization! We call and give them the cancellation confirmation. This was only after trying to get through the first operator (who is reading from a script and would not listen). We had to cut her off. Once she finally listens she tries to sell us a plan anyways at 14.95... We are then put on hold for 20 minutes... The 2nd operator confirms it was cancelled and yes they did take funds without any authorization... \$54 dollars. He then goes on to try to get us to buy it anyways... again. To his credit he said he was sorry. So explain why did they take the funds? No explanation... There was never authorization to take funds. FYI,</p>



Source of Complaint	Content of Complaint
	that is illegal!"
<p data-bbox="298 401 716 478"><a href="http://www.consumeraffairs.com/automotive/onstar.html">http://www.consumeraffairs.com/automotive/onstar.html</a></p> <p data-bbox="298 512 699 552">By Katie of Cincinnati, OH</p> <p data-bbox="298 594 542 634">Posted: 12/24/14</p> <p data-bbox="298 676 570 716">Retrieved: 5/26/15</p>	<p data-bbox="748 401 1498 1094">"What a RACKET!!! Onstar called us in our new car not long after we bought it and offered us minutes. At no time did she indicate when the minutes were up that we would be automatically enrolled in a monthly program and be charge \$25 a month. I called Onstar and the manager was extremely RUDE! She indicated I would have been notified by email of the automatic renewal. REALLY. At no time did I receive said email or did I agree to this program. Looking by the number of complaints they are laughing all the way to the bank! I cannot believe they have not been investigated for this scheme! Buyer beware. Don't buy minutes and don't give them your card information in ANYWAY for ANY REASON. They will just start charging you monthly until you realize it and call them."</p>
<p data-bbox="298 1167 716 1245"><a href="http://www.consumeraffairs.com/automotive/onstar.html">http://www.consumeraffairs.com/automotive/onstar.html</a></p> <p data-bbox="298 1278 699 1318">By Damian of Addison, TX</p> <p data-bbox="298 1360 542 1400">Posted: 11/25/14</p> <p data-bbox="298 1442 570 1482">Retrieved: 5/26/15</p>	<p data-bbox="748 1167 1498 1896">"I purchased my car on Dec of 2013 and it came with a complimentary 6-months trial. On the day of the purchase I talked to an OnStar representative who requested my credit card information. I did not want to provide it, but the person I talked to ensured me that my credit card would not be charged after the free trial without me renewing the contract. I never received a letter from OnStar informing of a renewal. Today I realized that OnStar has been charging my card since June 2014 without my authorization. I called OnStar and the representative informed me that I had been lied when told that the service would not renew automatically. She cancelled my contract and apologized for the inconvenience, but did not making things right by issuing a refund. This is very unethical and I wish consumer's rights would be protected against these companies doing whatever they want."</p>



Source of Complaint	Content of Complaint
<p data-bbox="302 321 716 401"><a href="http://www.consumeraffairs.com/automotive/onstar.html">http://www.consumeraffairs.com/automotive/onstar.html</a></p> <p data-bbox="302 436 686 474">By Howard of Snyder, NY</p> <p data-bbox="302 520 526 558">Posted: 10/8/14</p> <p data-bbox="302 604 570 642">Retrieved: 5/26/15</p>	<p data-bbox="748 321 1495 940">“A year ago, I leased a 2013 Chevy Cruze. The dealer advised me I was authorized a free 6-month trial subscription to OnStar. We realized recently, long after the 6 months had lapsed, that they (OnStar) were still withdrawing \$32 /month from our Discover account. Discover will credit us for only 2 months. Upon calling OnStar, they alleged we were duly advised of the opportunity for cancellation in an emailed advisory that we should have received in January or February. As some auto preset in my email client identified all OnStar messages as Spam. I have managed to recover them all and have scoured every OnStar email I received, no such advisory - duly or other - is mentioned anywhere.”</p>
<p data-bbox="302 1003 724 1125"><a href="http://www.consumeraffairs.com/automotive/onstar.html?page=2">http://www.consumeraffairs.com/automotive/onstar.html?page=2</a></p> <p data-bbox="302 1199 678 1236">By Gary of Lakeville, OH</p> <p data-bbox="302 1283 526 1320">Posted: 9/16/14</p> <p data-bbox="302 1367 570 1404">Retrieved: 5/26/15</p>	<p data-bbox="748 1003 1495 1413">“I recently purchased a used 2011 Cadillac CTS and was given 3 free months of OnStar service. At the end of three months I believed that the service was over and was not contacted by anyone from OnStar via phone or email to renew or change service. To my surprise I started getting overdraft notices from my bank and after reviewing my account it seems OnStar decided they would steal \$29.90 from my account. This happened for two months without my knowledge.”</p>
<p data-bbox="302 1476 724 1598"><a href="http://www.consumeraffairs.com/automotive/onstar.html?page=4">http://www.consumeraffairs.com/automotive/onstar.html?page=4</a></p> <p data-bbox="302 1671 675 1751">By Beverly of Gilmanton, NH</p> <p data-bbox="302 1797 578 1835">Posted: 12/17/2013</p> <p data-bbox="302 1881 570 1919">Retrieved: 5/26/15</p>	<p data-bbox="748 1476 1495 1885">“We purchased a new truck last year and OnStar was free for a few months. We activated OnStar and gave them banking information to pay for minutes for the phone just in case of an "emergency" when we first got the truck. Now that I think about it, why did we need minutes when that is what they are there for?? I checked my account today and noticed a charge and called the number and it was OnStar!! I couldn't believe it, I NEVER AUTHORIZED the monthly payment. It was for \$29.90 per month!</p>

Source of Complaint	Content of Complaint
	Never have we even used OnStar.”
<p data-bbox="305 401 727 520"><a href="http://www.consumeraffairs.com/automotive/onstar.html?page=4">http://www.consumeraffairs.com/automotive/onstar.html?page=4</a></p> <p data-bbox="305 594 618 632">By John of Orion, MI</p> <p data-bbox="305 678 545 716">Posted: 10/29/13</p> <p data-bbox="305 762 573 800">Retrieved: 5/26/15</p>	<p data-bbox="755 401 1502 800">“This just happened to me on my 2013 GMC Acadia, but luckily I caught it after a month, called and asked them to cancel it and refund my debit card. They then charged me another month, and I had to call my bank to dispute the charges - and my bank refunded me... We'll see if they bill me for month 3 but there definitely has to be some class action lawsuit grounds here. I specifically asked them to make sure nothing else billed besides the 100 minutes I bought for \$10.00.”</p>
<p data-bbox="305 875 727 995"><a href="http://www.consumeraffairs.com/automotive/onstar.html?page=4">http://www.consumeraffairs.com/automotive/onstar.html?page=4</a></p> <p data-bbox="305 1031 708 1102">By Lynn of Pleasant Grove, AL</p> <p data-bbox="305 1150 529 1188">Posted: 12/3/12</p> <p data-bbox="305 1234 573 1272">Retrieved: 5/26/15</p>	<p data-bbox="755 875 1502 1358">“We purchased our 2012 Chevy Silverado 4x4 on 5/26/2012. As with pretty much all Chevys, there were complimentary OnStar services for six months. At the time of purchase, at the urging of the sales person, we gave OnStar our debit card information "in case" it was ever needed, for no other reason. The free service expired 11/25 and this morning, 12/3/2012, my bank account showed that I had been charged \$28.90 for OnStar. We never authorized any such charges. Neither did OnStar send any advance notification that they were planning to debit our account.”</p>
<p data-bbox="305 1434 727 1554"><a href="http://www.consumeraffairs.com/automotive/onstar.html?page=5">http://www.consumeraffairs.com/automotive/onstar.html?page=5</a></p> <p data-bbox="305 1623 646 1661">By Brain of Burton, MI</p> <p data-bbox="305 1707 529 1745">Posted: 8/16/12</p> <p data-bbox="305 1791 573 1829">Retrieved: 5/26/15</p>	<p data-bbox="755 1434 1502 1915">“When setting up my car, we sat on the ramp in the rain and I had to press the OnStar button. The girl took all my information to establish my account and tried to sell me a package with minutes. I told her I did not want that. Remember, I own cell phone stores and have unlimited cell phone usage. She said she still needed my card to put on file, so I gave it, not expecting to be charged anything. Then, my credit card bill arrived this month with a charge from OnStar. I called to find out why and the rude lady told me that I opted into this and I said I did not. Then she said, "We wouldn't have your credit</p>

Source of Complaint	Content of Complaint
	card information to bill if you didn't opt in." I again said I did not want to be charged anything and was assured I wouldn't be when I set up the OnStar."
<a href="http://www.consumeraffairs.com/automotive/onstar.html?page=5">http://www.consumeraffairs.com/automotive/onstar.html?page=5</a> By Mary of Albuquerque, NM Posted: 11/12/11 Retrieved: 5/26/15	"I got charged for a subscription I did not order and it was charged on my credit card. When I called OnStar I was told that without an account number, they could not help me. I did not have an account number because I did not subscribe to OnStar. I have no clue how they got my Credit Card number to charge the subscription to my account."
<a href="http://www.customerservicescoreboard.com/OnStar/negative/?page=4">http://www.customerservicescoreboard.com/OnStar/negative/?page=4</a> By Ray0314 Posted: 2/20/14 Retrieved: 6/22/14	"OnStar has been making unauthorized charges to my credit card for two years now for my husband GMC Truck. They got my (not my husbands) CC billing information from an account I had for a GMC Enclave. I no longer own this vehicle and cancelled the service in Jan 11. When I called to inquire how they got my old account mixed up with my husbands vehicle the OnStar representative told me they could have linked it using our home telephone number. So when his 'Free Trial' period ran out they started billing my card. We have made several calls to OnStar and they tell us they are opening a dispute resolution ticket which will be handled in 10-15 days. This has not happened, we wait 10-15 days and call back. Each time we are on the phone for half an hour, wasting both of our time. Even though it is my CC they insist my husband be on the line since it is his vehicle. OnStar give me my money BACK and STOP charging my card!"
<a href="http://www.customerservicescoreboard.com/OnStar/negative/">http://www.customerservicescoreboard.com/OnStar/negative/</a>	"I have a 2013 camaro and after the 6 months they started charging my credit card without any notice, when i talked to them they refused to give me my

Source of Complaint	Content of Complaint
<p><u>ive/?page=3</u></p> <p>By MOE</p> <p>Posted: 6/1/14</p> <p>Retrieved: 6/22/15</p>	<p>money back and two MANAGERS hung up the phone when i started to ask for more details to get my money back, I called again and I cancelled it. Enough of them, if they don't respect us as customers.!"</p>
<p><u>http://www.customerservicescoreboard.com/OnStar</u></p> <p>By BCFQ</p> <p>Posted: 3/7/15</p> <p>Retrieved: 6/22/15</p>	<p>"Onstar withdrew funds from my account without any agreement or signed documents. For over a year I am not able to get my refund. Different departments each time I call and no result."</p>
<p><u>http://www.customerservicescoreboard.com/OnStar</u></p> <p>By Deniseg12</p> <p>Posted: 4/8/15</p> <p>Retrieved 6/22/15</p>	<p>"I recently purchased a vehicle with OnStar equipped. The dealership helped me set up my 3 month free trial. I then purchased some phone minutes also. I was told the minutes would expire when my trial expired, which was fine. I bought the minutes with my credit card. Then OnStar charged my card for monthly service after my trial ended. I gave OnStar permission to charge my card for the minutes, NOT to set me up on a monthly subscription! When I called to see why and cancel I was told that giving my card number was a requirement for my trial, which it was NOT! My free trial had already been set up with no credit card required! I have never even used the OnStar expect for calls that were paid for with the minutes I purchased. What a rip off and scam!"</p>
<p><u>http://www.consumeraffairs.com/automotive/onstar.html</u></p> <p>By Robert of Bedford, MA</p>	<p>"I had my Credit Card billed by OnStar. I never signed up or want their service. How did they get my Credit Card number? That is scary. OnStar could somehow get my card number without me giving it to them. My only contact with them has been a call</p>

Source of Complaint	Content of Complaint
<p>Posted: 5/12/15</p> <p>Retrieved: 6/22/15</p>	<p>from them and I told refused their service. OnStar committed fraud by somehow obtaining my Card number.”</p>
<p><a href="http://www.customerservicescoreboard.com/OnStar/negative/?page=6">http://www.customerservicescoreboard.com/OnStar/negative/?page=6</a></p> <p>By Anonymous</p> <p>Posted: 6/28/13</p> <p>Retrieved: 2/23/15</p>	<p>“I paid my bill once with debit card so they took the liberty and have been drafting my account for a year.”</p>
<p><a href="http://www.customerservicescoreboard.com/OnStar/negative/?page=5">http://www.customerservicescoreboard.com/OnStar/negative/?page=5</a></p> <p>By Not Happy</p> <p>Posted: 10/17/13</p> <p>Retrieved: 6/22/15</p>	<p>“I brought a 2013 chevy with the on-star. For the first few months it was a free service. After that term has expired they started charging me for usage. I DID NOT subscribe to them and for some reason they were able to charge it to my Discover account. I have conacted them about a refund but they refused me. I have contacted Discover and plan to contact the BBB in regards to this matter.”</p>
<p><a href="http://www.customerservicescoreboard.com/OnStar/negative/?page=5">http://www.customerservicescoreboard.com/OnStar/negative/?page=5</a></p> <p>By Anonymous</p> <p>Posted: 7/26/13</p> <p>Retrieved: 6/22/15</p>	<p>“Yeah, me too. I paid last year with a debit card and guess what - they took the liberty to debit my account this year. No notification, no permission, just took it upon themselves to debit my account. Is this legal? I am seriously considering taking this to JAG for their opinion.”</p>

40. OnStar’s unlawful and unfair practices as alleged herein continue to this date.

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## CLASS ACTION ALLEGATIONS

41. Plaintiff Kathryn Robinson brings this action on behalf of herself, and all others similarly situated, as a class action pursuant to Code of Civil Procedure section 382. The classes Plaintiff Robinson seeks to represent are defined as follows:

### **Nationwide EFTA Class**

All natural persons residing in the United States, or who have a United States-based bank account, and whose debit cards or bank accounts OnStar or any of its affiliates charged and/or debited for OnStar telematics services without obtaining written authorization from the consumer, or to whom OnStar did not provide a copy of written authorization it obtained from the consumer, from July 2, 2014 through the date certification notice is given to the class ("Nationwide EFTA Class").

### **California Class**

All natural persons residing in California whose debit or credit cards OnStar charged for OnStar telematics services without obtaining written authorization, affirmative consent, or express informed consent from the consumer, or to whom OnStar did not provide a copy of written authorization it obtained from the consumer, from July 2, 2011 through the date certification notice is given to the class ("California Class").

The Nationwide EFTA Class and California Class are hereafter referred collectively as the proposed "Classes."

42. Excluded from the Classes are (i) Defendant, any entity in which Defendant has a controlling interest or which has a controlling interest in Defendant, and Defendant's legal representatives, predecessors, successors and assigns; (ii)



1 governmental entities; (iii) Defendant's employees, officers, directors, agents, and  
2 representatives and their family members; (iv) the Judge and staff to whom this case  
3 is assigned, and any member of the Judge's immediate family; and (v) putative class  
4 members from whom OnStar obtained valid and enforceable written releases of the  
5 claims asserted in this complaint. Plaintiff reserves the right to amend the Class  
6 definitions if discovery and further investigation reveal the Nationwide EFTA Class  
7 and/or California Class should be expanded or otherwise modified.

8 43. This action has been brought and may properly be maintained as a class  
9 action, pursuant to the provisions of Code of Civil Procedure section 382 because  
10 there is a well-defined community of interest in the litigation and the proposed  
11 Classes are easily ascertainable.

12 44. Numerosity. Members of the proposed Nationwide EFTA and  
13 California Classes are so numerous that joinder of all of their members in one action  
14 is impracticable. OnStar has approximately 6 million Subscribers across the United  
15 States, all of whom are potentially affected by the conduct alleged herein because  
16 OnStar accepts only credit cards and debit cards for purchases of Minutes or OTS.  
17 Twelve percent of these, or approximately 720,000 persons, are estimated to be in  
18 California.

19 45. Common Issues Exist and Predominate. Common questions of law and  
20 fact exist as to all members of the Classes and predominate over any questions that  
21 affect only individual members of the Classes. There is a well-defined community  
22 of interest in the questions of law and fact involved that affect Plaintiff and members  
23 of the proposed Classes. The questions of law and fact predominate over questions  
24 that affect only individual members of the Classes and include, without limitation:

- 25 a. Whether OnStar's uniform acts and practices violated the EFTA;
- 26 b. Whether OnStar's uniform acts and practices violated the
- 27 Automatic Renewal Law;
- 28



- c. Whether OnStar's uniform course of conduct constitutes an unlawful act or business practice within the meaning of the UCL;
- d. Whether OnStar's uniform course of conduct constitutes an unfair act or business practice within the meaning of the UCL;
- e. Whether OnStar had a uniform policy of not obtaining written authorization for electronic funds transfers;
- f. Whether as a result of OnStar's misconduct Class members have suffered damages and the appropriate amount thereof; and
- g. Whether, as a result of Defendants' misconduct, Plaintiff is entitled to equitable relief and/or other relief and the nature of such relief.

46. Typicality. Plaintiff's claims are typical of the claims of the members of the proposed Classes. Plaintiff used her debit card to pay for Minutes and OnStar used her account information to automatically charge her for OTS services without her consent. Members of the Classes have experienced similar situations based on nearly identical facts. The right of each member of the Classes to payment of any actual, incidental, consequential, and/or statutory damages or equitable monetary relief resulting therefrom arises equally and is attributable to OnStar's misconduct, as these claims arise from the same nucleus of operative facts. Therefore, the claims of the Plaintiff are, and will be, typical of the claims of the other members of the Classes.

47. The Classes are Ascertainable. Plaintiff has adequately defined the Nationwide EFTA Class and California Class, as detailed above, so the Court will be able to use the definitions to determine class membership.

48. Adequacy. Plaintiff can and will fairly and adequately represent the interests of all members of the Classes, since Plaintiff has no conflicts with or interests antagonistic to other members of the Classes. Plaintiff has retained counsel

1 with substantial experience and success in the prosecution of complex consumer  
2 protection class action litigation.

3       49. Superiority. The proposed class action is superior to other available  
4 means to achieve a fair and efficient adjudication of this controversy. Class action  
5 treatment will permit a large number of similarly situated persons to prosecute their  
6 common claims in a single forum simultaneously, efficiently and without the  
7 unnecessary duplication of effort and expense that numerous individual actions  
8 would engender. The disposition of their claims in this case and as part of a single  
9 class action lawsuit, rather than thousands of individual lawsuits, will benefit the  
10 parties and greatly reduce the aggregate judicial resources that would be spent if this  
11 matter were handled as hundreds of separate lawsuits. Furthermore, given the  
12 extraordinary expenses and burden required to conduct discovery and present  
13 evidence about OnStar's misconduct, the burden of individual litigation would make  
14 it extremely difficult, if not impossible for individual members of the Classes to  
15 redress the wrongs asserted herein, while an important public interest will be served  
16 by addressing the matter as a class action. It would be impractical for a Class  
17 member to sue for only her individual claim arising from Defendant's misconduct as  
18 the court costs and attorney fees would be disproportionate to her individual  
19 damages. Moreover, separate prosecution by thousands of individual members of  
20 the Classes would likely establish inconsistent standards of conduct for the  
21 Defendant and result in the impairment of and potential harm to members' rights of  
22 members of the Classes and the disposition of their interests through actions to  
23 which they were not parties.

24                                   **FIRST CAUSE OF ACTION**

25                   **(Violations of the Electronic Funds Transfer Act, 15 U.S.C. 1693 *et seq.*)**

26                                   **On Behalf of the Nationwide EFTA Class**

27       50. Plaintiff repeats and re-alleges all prior paragraphs and incorporates  
28 them as if fully set forth herein.

1           51. Plaintiff seeks to recover for OnStar's violations of the Electronic  
2 Funds Transfer Act on behalf of herself and the Nationwide EFTA Class.

3           52. The EFTA provides a basic framework establishing the rights,  
4 liabilities, and responsibilities of participants in an electronic fund transfer system.  
5 15 U.S.C. §§ 1693 *et seq.* The "primary objective" of the EFTA "is the provision of  
6 individual consumer rights." *Id.* § 1693(b).

7           53. Any waiver of EFTA rights is void. "No writing or other agreement  
8 between a consumer and any other person may contain any provision which  
9 constitutes a waiver of any right conferred or cause of action created by this  
10 subchapter." 15 U.S.C. § 1693l.

11           54. OnStar's transfers of money from the bank accounts of Plaintiff and  
12 members of the Nationwide EFTA class, via their debit cards, as alleged herein, are  
13 "electronic fund transfers" within the meaning of the EFTA and the EFTA's  
14 implementing regulations, known as Regulation E and codified at 12 C.F.R. §§ 205  
15 *et seq.* An "electronic fund transfer" means "any transfer of funds, other than a  
16 transaction originated by check, draft, or similar paper instrument, which is initiated  
17 through an electronic terminal, telephonic instrument, or computer or magnetic tape  
18 so as to order, instruct, or authorize a financial institution to debit or credit an  
19 account." 15 U.S.C. § 1693a(7). The term is expressly defined to include  
20 "[t]ransfers resulting from debit card transactions, whether or not initiated through  
21 an electronic terminal." 12 C.F.R. § 205.3(b)(v).

22           55. The EFTA defines the term "preauthorized electronic transfer" as "an  
23 electronic fund transfer authorized in advance to recur at substantially regular  
24 intervals." 15 U.S.C. § 1693a(9). The Official Staff Interpretation of Regulation E  
25 describes a "preauthorized electronic transfer" as "one authorized by the consumer  
26 in advance of a transfer that will take place on a recurring basis, at substantially  
27 regular intervals, and will require no further action by the consumer to initiate the  
28 transfer." 12 C.F.R. Part 205, Supp. I, § 205.2(k), cmt. 1.

1           56. Section 1693e(a) of the EFTA prohibits preauthorized electronic  
2 transfers without written authorization: "A preauthorized electronic fund transfer  
3 from a consumer's account may be authorized by the consumer only in writing, and  
4 a copy of such authorization shall be provided to the consumer when made."  
5 15 U.S.C. § 1693e(a). Similarly, Regulation E provides: "Preauthorized electronic  
6 fund transfers from a consumer's account may be authorized only by a writing  
7 signed or similarly authenticated by the consumer. The person that obtains the  
8 authorization shall provide a copy to the consumer." 12 C.F.R. § 205.10(b).

9           57. Plaintiff and members of the Nationwide EFTA Class each maintained  
10 an "account" as that term is defined in 15 U.S.C § 1693a(2) and are "consumers"  
11 within the meaning of 15 U.S.C. § 1693a(5).

12           58. OnStar uniformly and routinely initiated preauthorized electronic fund  
13 transfers and took money from the bank accounts of Plaintiff and members of the  
14 Nationwide EFTA Class without obtaining their written authorization for the  
15 transfers, as required by the EFTA and Regulation E. OnStar also uniformly and  
16 routinely failed to provide a copy of any such written authorization to Plaintiff and  
17 the Nationwide EFTA Class members from whose bank accounts OnStar took  
18 preauthorized electronic fund transfers for OTS.

19           59. In December 2014, and again in January and February 2015, OnStar  
20 took \$29.90 from Plaintiff's Bank of America account via her debit card. In none of  
21 these instances did OnStar obtain Plaintiff's written authorization, nor did OnStar  
22 provide Plaintiff with copies of any such written authorizations.

23           60. The Official Staff Interpretation of Regulation E explains, "when a  
24 third-party payee," such as OnStar, "fails to obtain the authorization in writing or  
25 fails to give a copy to the consumer ... it is the third-party payee that is in violation  
26 of the regulation." 12 C.F.R. Part 205, Supp. I, § 205.10(b), cmt. 2.

27           61. As a direct and proximate result of OnStar's violations of the EFTA and  
28 Regulation E, Plaintiff and the Nationwide EFTA Class members have suffered

1 damages, including statutory damages, in the amount of the unauthorized debits  
 2 taken by OnStar from their bank accounts. 15 U.S.C. § 1693m. Plaintiff and the  
 3 Nationwide EFTA Class members are entitled to recover actual damages and/or  
 4 statutory damages in the amount of “the lesser of \$500,000 or 1 per centum of the  
 5 net worth of the defendant.” *Id.* § 1983m(a)(2)(B).

6 62. Pursuant to 15 U.S.C. § 1693m, Plaintiff and the Nationwide EFTA  
 7 Class are also entitled to recover costs of suit and attorneys’ fees from OnStar.

8  
 9 **SECOND CAUSE OF ACTION**  
 10 **(Violations of the Automatic Renewal Law,**  
 11 **Cal. Bus. & Prof. Code §§ 17600 *et seq.*)**  
 12 **On Behalf of the California Class**

13 63. Plaintiff repeats and re-alleges all prior paragraphs and incorporates  
 14 them as if fully set forth herein.

15 64. Plaintiff seeks to recover for OnStar’s violations of California’s  
 16 Automatic Renewal Law, Bus. & Prof. Code §§ 17600, *et seq.*, on behalf of herself  
 17 and the California Class.

18 65. The express intent of the California Legislature in enacting the  
 19 Automatic Renewal Law was to “end the practice of ongoing charging of consumer  
 20 credit or debit cards or third party payment accounts without the consumer’s explicit  
 21 consent for ongoing shipments of a product or ongoing deliveries of a service.” Bus.  
 22 & Prof. Code § 17600.

23 66. Bus. & Prof. Code § 17602(a)(2) makes it “unlawful for any business  
 24 making an automatic renewal or continuous service offer to ... [c]harge the  
 25 consumer’s credit or debit card or the consumer’s account with a third party for an  
 26 automatic renewal or continuous service without first obtaining the consumer’s  
 27 affirmative consent to the agreement containing the automatic renewal offer terms or  
 28 continuous service offer terms.”

1           67. The term “automatic renewal” is defined as “a plan or arrangement in  
2 which a paid subscription or purchasing agreement is automatically renewed at the  
3 end of a definite term for a subsequent term.” Bus. & Prof. Code § 17601(a). The  
4 term “continuous service” is “a plan or arrangement in which a subscription or  
5 purchasing agreement continues until the customer cancels the service.” *Id.*,  
6 §17601(e). OnStar’s OTS subscription service is both an “automatic renewal” plan  
7 or arrangement and a “continuous service” plan or arrangement.

8           68. OnStar uniformly failed to obtain affirmative consent from Plaintiff and  
9 the members of the California Class to its automatic renewal and continuous service  
10 offer terms before charging their debit and credit card accounts for OTS.

11           69. OnStar charged Plaintiff’s Bank of America debit card, thereby taking  
12 money from Plaintiff’s bank account, for the first time on December 17, 2014 for  
13 \$29.90, and again in January and February of 2015 for \$29.90 in each of those  
14 months. In none of these instances did OnStar first obtain Plaintiff’s affirmative  
15 consent to these charges.

16           70. Bus. & Prof. Code § 17603 states that if a business provides products to  
17 a consumer without first obtaining “the consumer’s affirmative consent as described  
18 in Section 17602,” the “products shall for all purposes be deemed an unconditional  
19 gift to the consumer,” “without any obligation whatsoever on the consumer’s part to  
20 the business ....”

21           71. Bus. & Prof. Code § 17604(a) states that “all available civil remedies  
22 that apply to a violation of this article may be employed.”

23           72. Plaintiff and the California Class members seek an order of this Court  
24 awarding all available civil remedies, including but not limited to a determination  
25 that anything OnStar may have provided to Plaintiff and the California Class was  
26 provided by OnStar as an unconditional gift; awarding restitution sufficient to refund  
27 to Plaintiff and the California Class all the sums taken from them by OnStar;  
28

injunctive relief; prejudgment interest according to proof; costs; and attorneys' fees as may be awardable under Code of Civil Procedure section 1021.5 or otherwise.

**THIRD CAUSE OF ACTION**  
**(For "Unlawful" Business Practices in Violation of**  
**Cal. Bus. & Prof. Code §§ 17200 *et seq.*)**  
**On Behalf of the California Class**

73. Plaintiff repeats and re-alleges all prior paragraphs and incorporates them as if fully set forth herein.

74. Plaintiff brings this cause of action on behalf of herself and the California Class, pursuant to the "unlawful" prong of Cal. Bus. & Prof. Code, §§ 17200, *et seq.* (hereafter the "Unfair Competition Law" or "UCL"). The UCL's unlawful prong "borrows" violations of other laws (state or federal, statutory or regulatory) and makes them independently actionable.

75. As alleged in more detail below, OnStar's acts and practices alleged herein are "unlawful" within the meaning of the UCL because they violated the following state and federal laws, regulations and rules:

a. the EFTA (15 U.S.C. §§ 1693 *et seq.*) and Regulation E (12 C.F.R., Part 205);

b. the Automatic Renewal Law (Cal. Bus. & Prof. Code §§ 17600, *et seq.*);

c. the "Telemarketing Sales Rule" of the Federal Trade Commission ("FTC"), 16 C.F.R. §§ 310 *et seq.*; and

d. the Federal Trade Commission Act, 15 U.S.C. § 5(a) ("FTC Act").

Violations of the EFTA and Regulation E

76. OnStar's acts and practices violated the EFTA and Regulation E, as alleged in paragraphs 1 through 62 of this complaint, and particularly in the First



1 Cause of Action, which are incorporated herein by reference. Therefore, OnStar's  
2 acts and practices also violated the "unlawful" prong of the UCL.

3 77. Plaintiff suffered injury in fact and lost money or property as a result of  
4 OnStar's violations of the EFTA and Regulation E because OnStar took money from  
5 Plaintiff's bank account via her debit card, totaling at least \$89.70, unlawfully. The  
6 EFTA and Regulation E prohibit OnStar from taking any money from Plaintiff's  
7 bank account without written authorization in the form specified in the EFTA and  
8 Regulation E. If OnStar had complied with the law, OnStar could not have taken  
9 any money from Plaintiff's account.

10 78. The EFTA "does not annul, alter or affect the laws of any State relating  
11 to electronic fund transfers" unless those laws are "inconsistent" with the EFTA. 15  
12 U.S.C. § 1693q. The UCL is not "inconsistent" with the EFTA because the UCL  
13 provides protection to consumers that is equal to or "greater than the protection  
14 afforded by" the EFTA. *Id.*

15 79. Under the UCL, Plaintiff and members of the California Class are  
16 entitled to equitable relief, including but not limited to restitution of all sums that  
17 OnStar unlawfully took from their bank accounts; as well as injunctive relief to put a  
18 halt to OnStar's unlawful conduct. Bus. & Prof. Code § 17203.

19 Violations of California's Automatic Renewal Law

20 80. OnStar's acts and practices violated California's Automatic Renewal  
21 Law (Cal. Bus. & Prof. Code §§ 17600, *et seq.*), as alleged in paragraphs 1 through  
22 72 of this Complaint, and particularly in the Second Cause of Action, which are  
23 incorporated herein by reference. Therefore, OnStar's acts and practices also  
24 violated the "unlawful" prong of the UCL.

25 81. Plaintiff suffered injury in fact and lost money or property as a result of  
26 OnStar's violations of California's Automatic Renewal Law. OnStar charged  
27 Plaintiff's debit card at least \$89.70 for automatic renewal or continuous service  
28 without first obtaining Plaintiff's affirmative consent for the charges. OnStar was

1 prohibited from making these charges and taking Plaintiff's money without the  
2 required affirmative consent. If OnStar had complied with the law, OnStar could not  
3 have made the charges, and would not have obtained this money from Plaintiff.

4 82. Under the UCL, Plaintiff and members of the California Class are  
5 entitled to equitable relief, including but not limited to restitution of all sums that  
6 OnStar unlawfully charged their debit and credit cards; as well as injunctive relief to  
7 put a halt to OnStar's unlawful conduct. Bus. & Prof. Code § 17203.

8 Violations of the FTC's Telemarketing Sales Rule

9 83. OnStar's acts and practices violated the FTC's Telemarketing Sales  
10 Rule, 16 C.F.R. §§ 310 *et seq.*, and are therefore "unlawful" within the meaning of  
11 the UCL.

12 84. The FTC's Telemarketing Sales Rule was adopted pursuant to the  
13 authority of the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15  
14 U.S.C. §§ 6101 *et seq.* (hereafter the "Telemarketing Fraud Act"). Congress enacted  
15 the Telemarketing Fraud Act in order to "offer consumers necessary protection from  
16 telemarketing deception and abuse." *Id.* § 6101(5).

17 85. The FTC's Telemarketing Sales Rule defines "telemarketing" as "a  
18 plan, program, or campaign which is conducted to induce the purchase of goods or  
19 services ... by use of one or more telephones and which involves more than one  
20 interstate telephone call." 16 C.F.R. §310.2(cc). The Rule defines "telemarketer" as  
21 "any person who, in connection with telemarketing, initiates or receives telephone  
22 calls to or from a consumer ...." *Id.* § 310.2(cc). The communications that took  
23 place between OnStar and Plaintiff, and between OnStar and the members of the  
24 California Class who registered for OTS by pressing an OnStar button in their  
25 vehicle or by calling OnStar's toll-free number, as alleged herein, constituted  
26 telemarketing within the meaning of the Rule, because they took place over the  
27 telephone and were conducted to induce the purchase by Plaintiff and the California  
28 Class of services from OnStar.

86. OnStar's conduct alleged herein constitutes "deceptive telemarketing acts or practices" and "abusive telemarketing acts or practices," and is prohibited by several subdivisions of the FTC's Telemarketing Sales Rule. *See* 16 C.F.R. § 310.3(a)(1)(i), (vii) (defining "deceptive telemarketing acts or practices"); *id.* § 310.4(a) (defining "abusive telemarketing acts or practices").

87. First, the Rule provides that "[i]t is a *deceptive telemarketing act or practice and a violation of this Rule* for any seller or telemarketer to engage in the following conduct:

(1) Before a customer consents to pay for goods or services offered, *failing to disclose truthfully, in a clear and conspicuous manner*, the following material information:

(i) *The total costs to purchase*, receive, or use, and the quantity of, *any goods or services that are the subject of the sales offer*; ....

16 C.F.R. § 310.3(a)(1)(i) (emphasis added).

88. OnStar violated this provision and engaged in deceptive telemarketing acts and practices by uniformly failing to disclose to Plaintiff and members of the California Class, truthfully and in a clear and conspicuous manner, the total costs that would be charged to their debit or credit cards for OnStar's OTS subscription service. In fact, OnStar failed to disclose that Plaintiff and members of the California Class were being signed up for OTS *at all*, and therefore failed to disclose that *any* cost, let alone the "total costs," would be charged for the service.

89. Second, the Rule provides that "[i]t is a *deceptive telemarketing act or practice and a violation of this Rule* for any seller or telemarketer to engage in the following conduct:

(1) Before a customer consents to pay for goods or services offered, *failing to disclose truthfully, in a clear and conspicuous manner*, the following material information:

....

(vii) If the offer includes a negative option feature, all material terms and conditions of the negative option feature, including, but not limited to, *the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s)*, the date(s) the charge(s) will be submitted for payment, and the specific steps the customer must take to avoid the charge(s); ....

16 C.F.R. § 310.3(a)(1)(vii) (emphasis added). In the Rule, a “negative option feature” is defined as follows: “[I]n an offer or agreement to sell or provide any goods or services, a provision under which a customer receives a product or service for free for an initial period and will incur an obligation to pay for the product or service if he or she does not take affirmative action to cancel before the end of that period.” *Id.* § 310.2(u).

90. OnStar violated this provision and engaged in deceptive telemarketing acts and practices by uniformly failing to disclose to Plaintiff and members of the California Class, truthfully and in a clear and conspicuous manner, that after the period of free OTS, OnStar would charge the debit or credit cards of Plaintiff and members of the California Class every month, unless and until Plaintiff and members of the California Class took affirmative action to stop the charges and cancel the OTS.

91. Third, the Rule provides that “[i]t is an *abusive telemarketing act or practice and a violation of this Rule* for any seller or telemarketer to engage in the following conduct:

(7) *Causing billing information to be submitted for payment ... without the express informed consent of the customer .... In any telemarketing transaction, the seller or telemarketer must obtain the express informed consent of the customer ... to be charged for the goods or services ... and to be charged using the identified account."*

16 C.F.R. § 310.4(a)(7) (emphasis added). The Rule also required OnStar to keep records of each "express informed consent ... required to be provided ... under this Rule." *Id.* § 310.5(a)(5).

92. OnStar violated this provision and engaged in abusive telemarketing acts and practices by uniformly causing billing information of Plaintiff and the members of the California Class to be submitted for payment without first obtaining their express informed consent to be charged, including their express informed consent for charges to be made to the specific debit or credit card accounts whose numbers OnStar had obtained from them. OnStar further violated the Rule by failing to maintain a record of each "express informed consent" required by the Rule. *See* 16 C.F.R. § 310.5(a)(5); *id.* § 310.5(b) ("Failure to keep all records required by § 310.5(a) shall be a violation of this Rule.").

93. OnStar charged Plaintiff's Bank of America debit card, and thereby took money from Plaintiff's account, for the first time on December 17, 2014 for \$29.90, and again in January and February of 2015 for \$29.90 in each of those months. In each instance, OnStar made these charges: (1) without disclosing to plaintiff, truthfully and in a clear and conspicuous manner, the total cost for OnStar service; (2) without disclosing to plaintiff, truthfully and in a clear and conspicuous manner, that she would continue to be charged for OnStar service unless she took affirmative action to cancel; and (3) without plaintiff's express informed consent. Plaintiff suffered injury in fact and lost money and property in the amount of at least \$89.70 as a result of these violations.

94. The Telemarketing Fraud Act, and the FTC's implementing Telemarketing Sales Rule, were not intended to "restrict any right which any person may have under any statute or common law," such as the UCL. *See* 15 U.S.C. § 6104(e).

95. Under the UCL, Plaintiff and members of the California Class are entitled to equitable relief, including but not limited to restitution of all sums that OnStar unlawfully charged their debit and credit cards; as well as injunctive relief to put a halt to OnStar's unlawful conduct. Bus. & Prof. Code § 17203. Plaintiff and members of the California Class are also entitled to interest, attorneys' fees, and costs.

#### Violations of the Federal Trade Commission Act

96. OnStar's acts and practices violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 ("FTC Act"), and are therefore "unlawful" within the meaning of the UCL.

97. Section 5 of the FTC Act prohibits "[u]nfair ... acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1). Under Section 5(n), an act or practice is "unfair" within the meaning of the FTC Act if it causes or is likely to cause substantial injury to consumers that is not reasonably avoidable by consumers and is not outweighed by countervailing benefits to consumers or to competition. *Id.*, § 45(n).

98. Courts routinely and consistently hold that taking money from consumers' bank accounts via debit cards or charging consumers' credit cards without the consumers' authorization is "unfair" within the meaning of the FTC Act, because as a matter of law, such conduct is likely to cause substantial injury, the injury is not reasonably avoidable, and the conduct has no countervailing benefits. *See, e.g., FTC v. J.K. Publications, Inc.*, 99 F.Supp.2d 1176, 1201 (C.D. Cal. 2000); *FTC v. Windward Marketing, Inc.*, 1997 WL 33642380, \*11-\*13 (N.D. Ga. Sept. 30, 1997).

99. OnStar's conduct of charging Plaintiff's and the California Class members' debit and credit cards without their authorization is "unfair" within the meaning of the FTC Act, and thus "unlawful" under the UCL.

100. Plaintiff suffered injury in fact and lost money or property as a result of OnStar's violations of the FTC Act. OnStar charged Plaintiff's debit card at least \$89.70, thereby taking that sum from Plaintiff's checking account, without first obtaining Plaintiff's affirmative consent. If OnStar had complied with the FTC Act, OnStar could not have made the charges, and would not have obtained this money from Plaintiff.

101. Under the UCL, Plaintiff and members of the California Class are entitled to equitable relief, including but not limited to restitution of all sums that OnStar unlawfully charged their debit and credit cards; as well as injunctive relief to put a halt to OnStar's unlawful conduct; all other relief allowed under Cal. Bus. & Prof. Code §17203; plus interest, attorneys' fees, and costs.

#### FOURTH CAUSE OF ACTION

(For "Unfair" Business Practices in Violation of  
Cal. Bus. & Prof. Code §§ 17200 *et seq.*)

On Behalf of the California Class

102. Plaintiff repeats and re-alleges all prior paragraphs and incorporates them as if fully set forth herein.

103. Plaintiff brings this cause of action on behalf of herself and the California Class, pursuant to the "unfair" prong of the UCL (Cal. Bus. and Prof. Code, §§ 17200, *et seq.*). Conduct may be deemed "unfair" within the meaning of the UCL even if no other law explicitly proscribes the conduct.

104. OnStar's acts and practices, as alleged herein, are "unfair" under all three formulations developed in the case law: the balancing test (*South Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 72 Cal.App.4th 861 (1999)), the



tethering test (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal.4th 163 (1999)), and the Section 5 test (*Camacho v. Automobile Club*, 142 Cal.App.4th 1394, 1403-05 (2006)).

105. OnStar's Conduct is "Unfair" Under the Balancing Test: To apply the balancing test, the Court asks whether the defendant's conduct is "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers," then "weighs the utility of the defendant's conduct against the gravity of the harm to the alleged victim." *South Bay*, 72 Cal.App.4th at 886 (quoting *Klein v. Earth Elements, Inc.*, 59 Cal.App.4th 965, 970 (1997); *State Farm Fire & Cas. Co. v. Superior Court*, 45 Cal.App.4th 1093, 1103-04 (1996)). OnStar's conduct is "unfair" under this test because charging consumers' credit or debit cards without their authorization or consent significantly harms consumers, yet has no redeeming moral or ethical utility that could outweigh the harm. As the California Supreme Court has explained in a similar context, "protection of unwary consumers from being duped by unscrupulous sellers is an exigency of the utmost priority in contemporary society." *Vasquez v. Superior Court*, 4 Cal. 3d 800, 808 (1971).

106. OnStar's Conduct is "Unfair" Under the Tethering Test: Under the tethering test, which was developed in the context of actions between competitors, a "finding of unfairness must be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition." *Cel-Tech*, 20 Cal.4th at 186-87. OnStar's acts and practices of surreptitiously subscribing consumers for OTS and charging their debit and credits accounts for OTS without consent violates the legislatively-declared policies expressed in the Electronic Funds Transfer Act, the Automatic Renewal Law, and the Telemarketing Sales Rule, among other laws. OnStar violated not only the letter, but also the spirit and purpose, of each of these laws, thereby engaging in "unfair" conduct under the UCL's "tethering test."

107. OnStar's Conduct is "Unfair" Under the Section 5 Test: Under the Section 5 test, which is derived from the liability standards governing the FTC Act,

conduct is unfair if: “(1) the consumer injury is substantial; (2) the injury is not outweighed by any countervailing benefits to consumers or competition; and (3) the injury could not reasonably have been avoided by consumers themselves.” *Boschma v. Home Loan Center, Inc.*, 198 Cal.App.4th 230, 253 (2011). OnStar’s practices have caused and are likely to cause substantial injury to Plaintiff and the California Class members, which injury is not and was not reasonably avoidable. In the case of Plaintiff Robinson, she lost \$89.70 to OnStar’s unfair business practices, and she could not have avoided the charges because she had no expectation that OnStar would charge her debit card without her authorization. Furthermore, OnStar’s practice of surreptitiously subscribing consumers for OTS and charging their debit and credits accounts for OTS fees without consent is not outweighed by any countervailing benefits to consumers.

108. Plaintiff suffered injury in fact and lost money or property as a result of OnStar’s “unfair” conduct. OnStar charged Plaintiff’s debit card, and took from her checking account, at least \$89.70 for OTS without first obtaining Plaintiff’s consent. If OnStar had not engaged in this “unfair” conduct, OnStar could not have made the charges, and would not have obtained this money from Plaintiff.

109. As remedies for OnStar’s “unfair” conduct, Plaintiff and California Class members seek an order of this Court awarding restitution, injunctive relief, and all other relief allowed under Bus. & Prof. Code § 17203, plus interest, attorneys’ fees, and costs.

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff prays for judgment against OnStar for the following:

1. An order certifying this action as a class action, and appointing Kathryn Robinson as representative plaintiff and her counsel, Stuart M. Eppsteiner and Andrew J. Kubik of Eppsteiner & Fiorica Attorneys, LLP and Kimberly A. Kralowec and Kathleen Styles Rogers of The Kralowec Law Group, to be class counsel;

2. Imposition of a constructive trust on, and restitution of, all amounts obtained by OnStar as a result of its misconduct, together with interest thereon from the date of payment;

3. All recoverable compensatory and other damages sustained by Plaintiff and Class members;

4. Actual and/or statutory damages for injuries suffered by Plaintiff and members of the proposed Classes in the maximum amount permitted by applicable law;

5. An order enjoining Defendant's wrongful, unlawful, and unfair conduct as set forth above;

6. Statutory pre-judgment and post-judgment interest on any monetary relief awarded;

7. Payment of attorneys' fees and costs as may be allowable under applicable law, including but not limited to Code of Civil Procedure section 1021.5; and

8. Such other relief as the Court may deem just and proper.

DATED: July 2, 2015

By: /s/ Stuart M. Eppsteiner

Stuart M. Eppsteiner, Esq.

Andrew J. Kubik, Esq.

EPPSTEINER & FIORICA

ATTORNEYS, LLP

Kimberly A. Kralowec, Esq.

Kathleen Styles Rogers, Esq.

THE KRALOWEC LAW GROUP

Counsel for Plaintiff and the Putative Class

**DEMAND FOR JURY TRIAL**

Plaintiff, individually and on behalf of all similarly situated persons, hereby demands a trial by jury on all issues so triable.

DATED: July 2, 2015

By: /s/ Stuart M. Eppsteiner

Stuart M. Eppsteiner, Esq.

Andrew J. Kubik, Esq.

EPPSTEINER & FIORICA

ATTORNEYS, LLP

Kimberly A. Kralowec, Esq.

Kathleen Styles Rogers, Esq.

THE KRALOWEC LAW GROUP

Counsel for Plaintiff and the Putative Class

<b>SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO</b>	
STREET ADDRESS: 330 W Broadway	
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CITY AND ZIP CODE: San Diego, CA 92101-3827	
BRANCH NAME: Central	
TELEPHONE NUMBER: (619) 450-7069	
PLAINTIFF(S) / PETITIONER(S): Kathryn M Robinson	
DEFENDANT(S) / RESPONDENT(S): Onstar LLC	
KATHRYN M ROBINSON VS ONSTAR LLC [E-FILE]	
<b>NOTICE OF CASE ASSIGNMENT AND CASE MANAGEMENT CONFERENCE on MANDATORY eFILE CASE</b>	CASE NUMBER: 37-2015-00022176-CU-BT-CTL

**CASE ASSIGNMENT**

Judge: Katherine Bacal

Department: C-69

**COMPLAINT/PETITION FILED: 07/02/2015**

TYPE OF HEARING SCHEDULED	DATE	TIME	DEPT	JUDGE
Civil Case Management Conference	01/29/2016	10:00 am	C-69	Katherine Bacal

A case management statement must be completed by counsel for all parties or self-represented litigants and timely filed with the court at least 15 days prior to the initial case management conference. (San Diego Local Rules, Division II, CRC Rule 3.725).

All counsel of record or parties in pro per shall appear at the Case Management Conference, be familiar with the case, and be fully prepared to participate effectively in the hearing, including discussions of ADR\* options.

IT IS THE DUTY OF EACH PLAINTIFF (AND CROSS-COMPLAINANT) TO SERVE A COPY OF THIS NOTICE WITH THE COMPLAINT (AND CROSS-COMPLAINT), THE ALTERNATIVE DISPUTE RESOLUTION (ADR) INFORMATION FORM (SDSC FORM #CIV-730), A STIPULATION TO USE ALTERNATIVE DISPUTE RESOLUTION (ADR) (SDSC FORM #CIV-359), AND OTHER DOCUMENTS AS SET OUT IN SDSC LOCAL RULE 2.1.5.

ALL COUNSEL WILL BE EXPECTED TO BE FAMILIAR WITH SUPERIOR COURT RULES WHICH HAVE BEEN PUBLISHED AS DIVISION II, AND WILL BE STRICTLY ENFORCED.

**TIME STANDARDS:** The following timeframes apply to general civil cases and must be adhered to unless you have requested and been granted an extension of time. General civil cases consist of all civil cases except: small claims proceedings, civil petitions, unlawful detainer proceedings, probate, guardianship, conservatorship, juvenile, parking citation appeals, and family law proceedings.

**COMPLAINTS:** Complaints and all other documents listed in SDSC Local Rule 2.1.5 must be served on all named defendants.

**DEFENDANT'S APPEARANCE:** Defendant must generally appear within 30 days of service of the complaint. (Plaintiff may stipulate to no more than 15 day extension which must be in writing and filed with the Court.) (SDSC Local Rule 2.1.6)

**JURY FEES:** In order to preserve the right to a jury trial, one party for each side demanding a jury trial shall pay an advance jury fee in the amount of one hundred fifty dollars (\$150) on or before the date scheduled for the initial case management conference in the action.

**MANDATORY eFILE:** Case assigned to mandatory eFile program per CRC 3.400-3.403 and SDSC Rule 2.4.11. All documents must be eFiled at [www.onelegal.com](http://www.onelegal.com). Refer to General Order 051414 at [www.sdcourt.ca.gov](http://www.sdcourt.ca.gov) for guidelines and procedures.

**\*ALTERNATIVE DISPUTE RESOLUTION (ADR):** THE COURT ENCOURAGES YOU TO CONSIDER UTILIZING VARIOUS ALTERNATIVES TO TRIAL, INCLUDING MEDIATION AND ARBITRATION, PRIOR TO THE CASE MANAGEMENT CONFERENCE. PARTIES MAY FILE THE ATTACHED STIPULATION TO USE ALTERNATIVE DISPUTE RESOLUTION (SDSC FORM #CIV-359).



## SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

### ALTERNATIVE DISPUTE RESOLUTION (ADR) INFORMATION

CASE NUMBER: 37-2015-00022176-CU-BT-CTL CASE TITLE:

Kathryn M Robinson vs Onstar LLC [E-FILE]

**NOTICE:** All plaintiffs/cross-complainants in a general civil case are required to serve a copy of the following three forms on each defendant/cross-defendant, together with the complaint/cross-complaint:

- (1) this Alternative Dispute Resolution (ADR) Information form (SDSC form #CIV-730),
- (2) the Stipulation to Use Alternative Dispute Resolution (ADR) form (SDSC form #CIV-359), and
- (3) the Notice of Case Assignment form (SDSC form #CIV-721).

Most civil disputes are resolved without filing a lawsuit, and most civil lawsuits are resolved without a trial. The courts, community organizations, and private providers offer a variety of Alternative Dispute Resolution (ADR) processes to help people resolve disputes without a trial. The San Diego Superior Court expects that litigants will utilize some form of ADR as a mechanism for case settlement before trial, and it may be beneficial to do this early in the case.

Below is some information about the potential advantages and disadvantages of ADR, the most common types of ADR, and how to find a local ADR program or neutral. A form for agreeing to use ADR is attached (SDSC form #CIV-359).

#### **Potential Advantages and Disadvantages of ADR**

ADR may have a variety of advantages or disadvantages over a trial, depending on the type of ADR process used and the particular case:

##### **Potential Advantages**

- Saves time
- Saves money
- Gives parties more control over the dispute resolution process and outcome
- Preserves or improves relationships

##### **Potential Disadvantages**

- May take more time and money if ADR does not resolve the dispute
- Procedures to learn about the other side's case (discovery), jury trial, appeal, and other court protections may be limited or unavailable

#### **Most Common Types of ADR**

You can read more information about these ADR processes and watch videos that demonstrate them on the court's ADR webpage at <http://www.sdcourt.ca.gov/adr>.

**Mediation:** A neutral person called a "mediator" helps the parties communicate in an effective and constructive manner so they can try to settle their dispute. The mediator does not decide the outcome, but helps the parties to do so. Mediation is usually confidential, and may be particularly useful when parties want or need to have an ongoing relationship, such as in disputes between family members, neighbors, co-workers, or business partners, or when parties want to discuss non-legal concerns or creative resolutions that could not be ordered at a trial.

**Settlement Conference:** A judge or another neutral person called a "settlement officer" helps the parties to understand the strengths and weaknesses of their case and to discuss settlement. The judge or settlement officer does not make a decision in the case but helps the parties to negotiate a settlement. Settlement conferences may be particularly helpful when the parties have very different ideas about the likely outcome of a trial and would like an experienced neutral to help guide them toward a resolution.

**Arbitration:** A neutral person called an "arbitrator" considers arguments and evidence presented by each side and then decides the outcome of the dispute. Arbitration is less formal than a trial, and the rules of evidence are usually relaxed. If the parties agree to binding arbitration, they waive their right to a trial and agree to accept the arbitrator's decision as final. With nonbinding arbitration, any party may reject the arbitrator's decision and request a trial. Arbitration may be appropriate when the parties want another person to decide the outcome of their dispute but would like to avoid the formality, time, and expense of a trial.



**Other ADR Processes:** There are several other types of ADR which are not offered through the court but which may be obtained privately, including neutral evaluation, conciliation, fact finding, mini-trials, and summary jury trials. Sometimes parties will try a combination of ADR processes. The important thing is to try to find the type or types of ADR that are most likely to resolve your dispute. Be sure to learn about the rules of any ADR program and the qualifications of any neutral you are considering, and about their fees.

### **Local ADR Programs for Civil Cases**

**Mediation:** The San Diego Superior Court maintains a Civil Mediation Panel of approved mediators who have met certain minimum qualifications and have agreed to charge \$150 per hour for each of the first two (2) hours of mediation and their regular hourly rate thereafter in court-referred mediations.

**On-line mediator search and selection:** Go to the court's ADR webpage at [www.sdcourt.ca.gov/adr](http://www.sdcourt.ca.gov/adr) and click on the "Mediator Search" to review individual mediator profiles containing detailed information about each mediator including their dispute resolution training, relevant experience, ADR specialty, education and employment history, mediation style, and fees and to submit an on-line Mediator Selection Form (SDSC form #CIV-005). The Civil Mediation Panel List, the Available Mediator List, individual Mediator Profiles, and Mediator Selection Form (CIV-005) can also be printed from the court's ADR webpage and are available at the Mediation Program Office or Civil Business Office at each court location.

**Settlement Conference:** The judge may order your case to a mandatory settlement conference, or voluntary settlement conferences may be requested from the court if the parties certify that: (1) settlement negotiations between the parties have been pursued, demands and offers have been tendered in good faith, and resolution has failed; (2) a judicially supervised settlement conference presents a substantial opportunity for settlement; and (3) the case has developed to a point where all parties are legally and factually prepared to present the issues for settlement consideration and further discovery for settlement purposes is not required. Refer to SDSC Local Rule 2.2.1 for more information. To schedule a settlement conference, contact the department to which your case is assigned.

**Arbitration:** The San Diego Superior Court maintains a panel of approved judicial arbitrators who have practiced law for a minimum of five years and who have a certain amount of trial and/or arbitration experience. Refer to SDSC Local Rules Division II, Chapter III and Code Civ. Proc. § 1141.10 et seq or contact the Arbitration Program Office at (619) 450-7300 for more information.

**More information about court-connected ADR:** Visit the court's ADR webpage at [www.sdcourt.ca.gov/adr](http://www.sdcourt.ca.gov/adr) or contact the court's Mediation/Arbitration Office at (619) 450-7300.

**Dispute Resolution Programs Act (DRPA) funded ADR Programs:** The following community dispute resolution programs are funded under DRPA (Bus. and Prof. Code §§ 465 et seq.):

- In Central, East, and South San Diego County, contact the National Conflict Resolution Center (NCRC) at [www.ncrconline.com](http://www.ncrconline.com) or (619) 238-2400.
- In North San Diego County, contact North County Lifeline, Inc. at [www.nclifeline.org](http://www.nclifeline.org) or (760) 726-4900.

**Private ADR:** To find a private ADR program or neutral, search the Internet, your local telephone or business directory, or legal newspaper for dispute resolution, mediation, settlement, or arbitration services.

### **Legal Representation and Advice**

To participate effectively in ADR, it is generally important to understand your legal rights and responsibilities and the likely outcomes if you went to trial. ADR neutrals are not allowed to represent or to give legal advice to the participants in the ADR process. If you do not already have an attorney, the California State Bar or your local County Bar Association can assist you in finding an attorney. Information about obtaining free and low cost legal assistance is also available on the California courts website at [www.courtinfo.ca.gov/selfhelp/lowcost](http://www.courtinfo.ca.gov/selfhelp/lowcost).



<b>SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO</b> STREET ADDRESS: 330 West Broadway MAILING ADDRESS: 330 West Broadway CITY, STATE, & ZIP CODE: San Diego, CA 92101-3827 BRANCH NAME: Central PLAINTIFF(S): Kathryn M Robinson DEFENDANT(S): Onstar LLC SHORT TITLE: KATHRYN M ROBINSON VS ONSTAR LLC [E-FILE]	<b>FOR COURT USE ONLY</b>
<b>STIPULATION TO USE ALTERNATIVE DISPUTE RESOLUTION (ADR)</b>	CASE NUMBER: 37-2015-00022176-CU-BT-CTL

Judge: Katherine Bacal

Department: C-69

The parties and their attorneys stipulate that the matter is at issue and the claims in this action shall be submitted to the following alternative dispute resolution (ADR) process. Selection of any of these options will not delay any case management timelines.

- |   |  |
|---|--|
| <input type="checkbox"/> Mediation (court-connected)  | <input type="checkbox"/> Non-binding private arbitration   |
| <input type="checkbox"/> Mediation (private)  | <input type="checkbox"/> Binding private arbitration   |
| <input type="checkbox"/> Voluntary settlement conference (private)                            | <input type="checkbox"/> Non-binding judicial arbitration (discovery until 15 days before trial) |
| <input type="checkbox"/> Neutral evaluation (private)   | <input type="checkbox"/> Non-binding judicial arbitration (discovery until 30 days before trial) |
| <input type="checkbox"/> Other (specify e.g., private mini-trial, private judge, etc.): _____ |  |

It is also stipulated that the following shall serve as arbitrator, mediator or other neutral: (Name) \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Alternate neutral (for court Civil Mediation Program and arbitration only): \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

Name of Plaintiff

Name of Defendant

Signature

Signature

Name of Plaintiff's Attorney

Name of Defendant's Attorney

Signature

Signature

If there are more parties and/or attorneys, please attach additional completed and fully executed sheets.

It is the duty of the parties to notify the court of any settlement pursuant to Cal. Rules of Court, rule 3.1385. Upon notification of the settlement, the court will place this matter on a 45-day dismissal calendar.

No new parties may be added without leave of court.

**IT IS SO ORDERED.**

Dated: 07/06/2015

JUDGE OF THE SUPERIOR COURT

## **EXHIBIT B**



CORPORATION SERVICE COMPANY®

## Notice of Service of Process

null / ALL  
Transmittal Number: 13980978  
Date Processed: 07/06/2015

**Primary Contact:** Rosemarie Williams  
General Motors LLC  
Mail Code 48482-038-210  
400 Renaissance Center  
Detroit, MI 48265

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**Entity:** Onstar, LLC  
Entity ID Number 2599504

**Entity Served:** Onstar, LLC

**Title of Action:** Robinson, Kathryn, M. vs. Onstar LLC

**Document(s) Type:** Summons/Complaint

**Nature of Action:** Class Action

**Court/Agency:** San Diego County Superior Court, California

**Case/Reference No:** 37-2015-00022176-CU-BT-CTL

**Jurisdiction Served:** California

**Date Served on CSC:** 07/06/2015

**Answer or Appearance Due:** 30 Days

**Originally Served On:** CSC

**How Served:** Personal Service

**Sender Information:** Eppsteiner & Fiorica Attorneys, LLP (San Diego, CA)  
858-350-1500

**Client Requested Information:** Year:  
Make:  
Model:  
VIN:

---

**Notes:** Eppsteiner & Fiorica Attorneys, LLP 12555 High Bluff Dr., Suite 155 San Diego, CA 92130  
CSC Location document was served: Corporation Service Company which will do business in California as  
Csc-Lawyers Incorporating Service 2710 Gateway Oaks Drive Suite 150N Sacramento, CA 95833

Information contained on this transmittal form is for record keeping, notification and forwarding the attached document(s). It does not constitute a legal opinion. The recipient is responsible for interpreting the documents and taking appropriate action.

**To avoid potential delay, please do not send your response to CSC**  
*CSC is SAS70 Type II certified for its Litigation Management System.*  
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## **EXHIBIT C**

O  
JS-6

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
SOUTHERN DIVISION**

**DIANA TAIT, ET AL.,  
Plaintiffs,**

**vs.**

**BSH HOME APPLIANCES  
CORPORATION,  
Defendants.**

**Case No.: SACV 10-0711-DOC (ANx)**

**ORDER GRANTING PLAINTIFFS’  
MOTION FOR ATTORNEY’S FEES  
AND REIMBURSEMENT OF  
EXPENSES, AND PLAINTIFFS’  
REQUEST FOR SERVICE  
AWARDS [372]; GRANTING  
PLAINTIFFS’ MOTION FOR  
FINAL APPROVAL OF CLASS  
ACTION SETTLEMENT [373]**

Before the Court is Plaintiffs’ Motion for Attorney’s Fees and Reimbursement of Expenses, and Plaintiffs’ Request for Service Awards (“Motion for Fees”) (Dkt. 372) and Plaintiffs’ Motion for Final Approval of Class Action Settlement (“Motion for Final Approval”) (Dkt. 373). The Court held a hearing on this matter on June 8, 2015. Defendant did not file an opposition to the two motions. The Court received a number of objections to the proposed settlement. After reviewing the moving papers, considering the arguments at the hearing, and reviewing the entirety of the record, the Court GRANTS the Motion for Fees and the Court GRANTS the Motion for Final Approval.

## I. Background

### A. Procedural History

On June 3, 2010, Plaintiffs Diana Tait and Nancy Wentworth filed a Complaint against Defendant BSH Home Appliances Corporation (“BSH”) alleging that certain BSH washing machines have a propensity to develop a filmy substance referred to as “Biofilm,” bacteria, mold, fungus, and bioorganic material which produce foul odors (Dkt. 1). On February 14, 2011, Plaintiffs Sharon Cobb, Beverly Gibson, Trish Isabella, Diana Tait and Nancy Wentworth filed the Consolidated Amended Complaint (“CAC”) (Dkt. 41). BSH moved to dismiss the CAC (Dkt. 43). In the meantime, the consolidated action was transferred from Judge Cormac J. Carney to this Court (Dkt. 58). The Court granted BSH’s motion to dismiss with leave to amend (Dkt. 60), and Plaintiffs filed a Second Consolidated Amended Complaint (“SCAC”) (Dkt. 66). BSH renewed its motion to dismiss (Dkt. 67), which the Court granted in part, and denied in part (Dkt. 74). BSH answered the SCAC on September 21, 2011 (Dkt. 75).

Plaintiffs moved for certification of four individual state classes comprised of purchasers of BSH washers in California, Illinois, Maryland, and New York, respectively (Dkt. 87). BSH opposed the certification motion and moved to strike Plaintiffs’ experts’ opinions (Dkts. 96-102, 103-104). On December 20, 2012, the Court certified four state classes and denied BSH’s motion to exclude the opinions of Plaintiffs’ engineering and biology experts (Dkt. 166). *Tait v. BSH Home Appliances Corp.*, 289 F.R.D. 466 (C.D. Cal. 2012).

BSH petitioned the Ninth Circuit for permission to appeal the class certification order on January 3, 2013. At the same time, petitions for certiorari were pending in similar moldy washer cases against Whirlpool Corporation (“*Whirlpool*”) and Sears, Roebuck & Co. (“*Kenmore*”) challenging class certification decisions by the Sixth and Seventh Circuits. On April 1, 2013, the Supreme Court granted certiorari in both *Whirlpool* and *Kenmore*, vacated the respective circuit opinions, and remanded for reconsideration in light of *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013) (“GVR Orders”). The same day, the Ninth Circuit denied BSH’s petition for review. BSH filed a motion for reconsideration, which the Ninth Circuit denied. Following the GVR Orders, the Sixth and Seventh Circuits reaffirmed their earlier

1 decisions, and Whirlpool and Sears once again petitioned for certiorari. Earlier, on July 30,  
 2 2013, BSH filed its own petition for a writ of certiorari from the Ninth Circuit's denial of  
 3 permission to appeal. The petitions for all three cases were denied on February 24, 2014.

4 Plaintiffs' claims against BSH are on behalf of all United States residents who purchased  
 5 one or more Bosch or Siemens brand 27-inch front-loading washing machines. Provisional  
 6 Fourth Amended Complaint (Dkt. 370) ¶ 2.<sup>1</sup> Plaintiffs allege that BSH designed, manufactured,  
 7 marketed, and sold washers with a propensity to develop bacteria, mold and foul odors  
 8 ("BMFO"), and that BSH failed to disclose this defect or the extraordinary tasks required to  
 9 abate or ameliorate BMFO. *Id.* ¶¶ 4-7, 44-45. Plaintiffs brought claims against BSH for  
 10 violations of state consumer protection statutes, common law fraudulent concealment and  
 11 nondisclosure, breach of express and implied warranties, and unjust enrichment. *Id.* ¶¶ 98-207.

12 BSH filed a motion for sanctions related to Plaintiffs' damages experts (Dkt. 232),  
 13 which the Court denied on August 20, 2014 (Dkt. 252). Plaintiffs filed a motion for spoliation  
 14 sanctions related to discovery issues (Dkt. 265), which was also denied (Dkt. 284).

15 On August 25, 2014, the Court approved Plaintiffs' proposed Notice Plan and draft  
 16 forms of notice to the Class (Dkt. 258). Class notice was disseminated to California, Illinois,  
 17 Maryland, and New York class members beginning in late September.

18 On August 29, 2014, BSH filed a motion for partial summary judgment (Dkt. 259). Ten  
 19 days later, BSH filed a motion to decertify the classes (Dkt. 276). The parties also filed cross-  
 20 motions to exclude the opinions of each other's experts ("*Daubert* motions") (Dkts. 289, 335).  
 21 At the time of settlement, the partial summary judgment and decertification motions had been  
 22 fully briefed and were awaiting hearing and final rulings, and reply briefs for the *Daubert*  
 23 motions were days from being filed.

24 Discovery in this matter may fairly be described as extensive and contentious. Plaintiffs  
 25 served multiple sets of document requests, interrogatories, and requests for admissions.

---

26  
 27 <sup>1</sup> Plaintiffs originally alleged claims related to 24-inch washing machines, too, but those claims  
 28 were not certified, are not included in the settlement, and will not be released. The operative  
 Fourth Amended Consolidated Complaint clarifies that the Class includes only purchasers of the  
 27-inch machines.



1 Declaration of Kristen Law Sagafi (“Sagafi Decl.”) (Dkt. 373-1) ¶ 8. BSH produced tens of  
 2 thousands of pages of documents, including detailed consumer complaint records and internal  
 3 correspondence regarding the design and marketing of the washers. *Id.* The parties took and  
 4 defended 28 fact witness depositions, including of BSH marketing, engineering, and consumer  
 5 complaint employees and former employees. These depositions took place across the United  
 6 States and in the Netherlands. *Id.* The named Plaintiffs were also deposed. *Id.* ¶ 22.

7 The parties presented, collectively, 21 experts who together prepared and served 32  
 8 expert reports, including eight disclosed during the class certification stage. The experts  
 9 prepared reports related to the washers’ allegedly defective design, mold growth and testing,  
 10 consumer complaints, consumer perception of BSH’s marketing and alleged non-disclosures,  
 11 and damages. *Id.* ¶ 9. The parties took and defended a total of 26 expert depositions, with some  
 12 of the experts being deposed both at the class certification and the merits phases. *Id.*

### 13 **B. Settlement Negotiations**

14 The parties attended mediation on December 8, 2013, with the Honorable Daniel S. Pratt  
 15 (Ret.) serving as mediator. At that time, this case and similar cases against other manufacturers  
 16 of front-loading washing machines were facing the possibility of Supreme Court review. The  
 17 case did not settle. Sagafi Decl. ¶ 12.

18 Pursuant to the Court’s Scheduling Order dated June 30, 2014, the parties participated in  
 19 mediation again, this time with the Honorable Dickran Tevrizian (Ret.), on September 8, 2014.  
 20 The parties reached agreement on some significant issues, but did not reach full agreement on  
 21 all terms. *Id.* ¶ 13.

22 Following the second mediation, the parties resumed active litigation, including  
 23 continued expert work and briefing on BSH’s motion for summary judgment, BSH’s motion to  
 24 decertify the class, and *Daubert* motions, along with trial preparation. *Id.* ¶¶ 13-14. On October  
 25 21, 2014, the parties resumed negotiations without the assistance of the mediator. The parties  
 26 reached agreement on the outstanding issues and executed a memorandum of understanding  
 27 (“MOU”) on November 3, 2014. The parties negotiated the amount of attorney’s fees and costs  
 28 and service awards for the class representatives only after completing negotiation of the

1 substantive settlement terms. *Id.* ¶ 14; Declaration of Dickran Tevrizian (“Tevrizian Decl.”)  
2 (Dkt. 386) ¶ 7.

3 Following the MOU, there were further negotiations over the specifics of the claims  
4 process and the notice program, including consultation with the claims administrator, KCC. In  
5 parallel with these efforts, class counsel worked diligently to prepare the preliminary approval  
6 motion. Sagafi Decl. ¶ 18. On December 12, 2014, the parties fully executed the Settlement  
7 Agreement, and that same day, class counsel moved for preliminary approval (Dkt. 363).

8 On December 29, 2014, the Court granted Plaintiffs’ Unopposed Motion for Preliminary  
9 Approval (Dkt. 368), preliminarily finding the Settlement to be “fair, reasonable, and  
10 adequate,” and “direct[ing] the Claims Administrator and the parties to carry out the Notice  
11 Plan as provided for in the Settlement.”

### 12 **C. Key Terms of the Settlement**

13 The settlement class consists of all residents of the United States who were the original  
14 purchasers of one or more Bosch or Siemens brand 27-inch front-loading washers (with certain  
15 exclusions). Settlement Agreement (Dkt. 363-1) at 7, § II.G.

16 The settlement is a “claims-made” settlement. Each member of the class is eligible for a  
17 \$55 cash payment from BSH. *Id.* § III.A. In order to receive the payment, class members for  
18 whom BSH had proof of ownership through its warranty records needed only to confirm their  
19 correct mailing addresses and submit a statement under penalty of perjury that they were the  
20 original purchaser. Other class members needed to provide proof of ownership through other  
21 means (such as a receipt, invoice, credit card statement, or picture of their washer’s serial  
22 number) along with a statement under penalty of perjury that they were the original purchaser  
23 of the washer. Class members had until May 28, 2015, to submit a claim.

24 BSH agreed not to oppose a request by class counsel for attorney’s fees and costs of \$6.5  
25 million, including expert fees and costs. *Id.* at 15, § VI.

26 The settlement provides for a release of liability that will preclude future claims “arising  
27 out of, or in any way relating to any act, failure to act, omission, misrepresentation, fact, event,  
28 transaction, or occurrence from the beginning of time until the Effective Date of this Settlement

1 Agreement that were raised or could have been raised in the Action relating in any way to  
 2 BMFO in the Washers (including the Nationwide Claims), except for claims for personal  
 3 injury, emotional distress, or wrongful death.” *Id.* at 17, § VIII.B.

4 Notice of the settlement was provided by mail or email to over 140,000 out of an  
 5 estimated 650,000 class members. Notice was also provided through the Internet, including by  
 6 the use of Internet banner ads and a settlement website, which is linked to by class counsel’s  
 7 websites. Declaration of Eric Robin (“Robin Decl.”) (Dkt. 373-2) ¶ 14; Sagafi Decl. ¶ 19.  
 8 Notice was also published in the *Orange County Register* and *People* and *National Geographic*  
 9 magazines. Robin Decl. ¶ 11.

## 10 **II. Legal Standard**

### 11 **A. Settlement Approval**

12 “The claims, issues, or defenses of a certified class may be settled, voluntarily  
 13 dismissed, or compromised only with the court’s approval.” Fed. R. Civ. P. 23(e). Court  
 14 approval involves a two-step process: (1) preliminary approval of the settlement; and (2)  
 15 following a notice period to the class, final approval of the settlement at a fairness hearing. *See*  
 16 *Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 525 (C.D. Cal. 2004). The  
 17 Court may issue final approval of a class settlement “only after a hearing and on finding that it  
 18 is fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e)(2); *In re Bluetooth Headset Prods.*  
 19 *Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011). Once the court certifies a settlement class,  
 20 approval of the settlement terms rests in the court’s sound discretion. *Class Plaintiffs v. Seattle*,  
 21 955 F.2d 1268, 1291 (9th Cir. 1992).

22 “A difficult balancing act almost always confronts a district court tasked with approving  
 23 a class action settlement.” *Allen v. Bedolla*, 787 F.3d 1218, 1223 (9th Cir. 2015). On the one  
 24 hand, “there is a strong judicial policy that favors settlements, particularly where complex class  
 25 action litigation is concerned.” *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008).  
 26 “But on the other hand, ‘settlement class actions present unique due process concerns for absent  
 27 class members,’ and the district court has a fiduciary duty to look after the interests of those  
 28 absent class members.” *Allen*, 787 F.3d at 1223 (internal citations omitted).

1 Upon appellate review, approval of a settlement's substantive fairness will rarely be  
 2 overturned "unless the terms of the agreement contain convincing indications that . . . self-  
 3 interest rather than the class's interests in fact influenced the outcome of the negotiations."  
 4 *Staton v. Boeing Co.*, 327 F.3d 938, 960 (9th Cir. 2003). However, district courts in the Ninth  
 5 Circuit are held "to a higher *procedural* standard when making that determination of  
 6 substantive fairness." *Allen*, 787 F.3d at 1223. "To survive appellate review, the district court  
 7 must show it has explored comprehensively all factors, and must give a reasoned response to all  
 8 non-frivolous objections." *Dennis v. Kellogg Co.*, 697 F.3d 858, 864 (9th Cir. 2012) (citations  
 9 and internal quotation marks omitted).

10 In considering final approval of a proposed settlement, the Court's discretion is guided  
 11 by the following factors:

12 (1) the strength of the plaintiffs' case; (2) the risk, expense, complexity, and  
 13 likely duration of further litigation; (3) the risk of maintaining class action  
 14 status throughout the trial; (4) the amount offered in settlement; (5) the  
 15 extent of discovery completed and the stage of the proceedings; (6) the  
 16 experience and views of counsel; (7) the presence of a governmental  
 participant; and (8) the reaction of class members to the proposed  
 settlement.

17 *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 556, 575 (9th Cir. 2004). "This list is not  
 18 exhaustive, and different factors may predominate in different factual contexts." *Torrissi v.*  
 19 *Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993). In addition to these factors, the  
 20 Court may consider the procedure by which the parties arrived at the settlement to determine  
 21 whether the settlement is truly the product of arm's length bargaining, rather than the product of  
 22 collusion or fraud. *See Chun-Hoon v. McKee Foods Corp.*, 716 F. Supp. 2d 848, 851 (N.D. Cal.  
 23 2010).

24 The Court's role in evaluating the proposed settlement "must be limited to the extent  
 25 necessary to reach a reasoned judgment that the agreement is not the product of fraud or  
 26 overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as  
 27 a whole, is fair, reasonable, and adequate to all concerned." *Rodriguez v. West Publ'g Corp.*,  
 28 563 F.3d 948, 965 (9th Cir. 2009) (internal quotation marks omitted).

1 In general, there is a strong judicial policy favoring class settlements. *Class Plaintiffs*,  
 2 955 F.2d at 1276. In evaluating a settlement agreement, it is not the Court's role to second-  
 3 guess the agreement's terms. *Officers for Justice v. Civil Serv. Comm'n of City & Cnty. of San*  
 4 *Francisco*, 688 F.2d 615, 625 (9th Cir. 1982). If the settlement cannot be approved as is, the  
 5 Court must reject the settlement because it is not authorized "to delete, modify or substitute  
 6 certain provisions. The settlement must stand or fall in its entirety." *Hanlon v. Chrysler Corp.*,  
 7 150 F.3d 1011, 1026 (9th Cir. 1998) (internal quotation marks omitted).

### 8 **B. Attorney's Fees and Costs**

9 "In a certified class action, the court may award reasonable attorney's fees and  
 10 nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h).  
 11 "[C]ourts have an independent obligation to ensure that the award, like the settlement itself, is  
 12 reasonable, even if the parties have already agreed to an amount." *In re Bluetooth*, 654 F.3d at  
 13 941. "The reasonableness of a fee award must be considered against the backdrop of the  
 14 'American Rule,' which provides that courts generally are without discretion to award  
 15 attorneys' fees to a prevailing plaintiff unless" an exception applies. *Id.* "The award of  
 16 attorneys' fees in a class action settlement is often justified by the common fund or statutory  
 17 fee-shifting exceptions to the American Rule, and sometimes both." *Id.*

18 "An award of attorneys' fees incurred in a suit based on state substantive law is  
 19 generally governed by state law." *Champion Produce, Inc. v. Ruby Robinson Co.*, 342 F.3d  
 20 1016, 1024 (9th Cir. 2003). "The task of a federal court in a diversity action is to approximate  
 21 state law as closely as possible in order to make sure that the vindication of the state right is  
 22 without discrimination because of the federal forum." *Farmers Ins. Exch. v. Law Offices of*  
 23 *Conrado Joe Sayas, Jr.*, 250 F.3d 1234, 1236 (9th Cir. 2001) (internal quotation marks  
 24 omitted); *see also Winterrowd v. Am. Gen. Annuity Ins. Co.*, 556 F.3d 815, 827 (9th Cir. 2009)  
 25 ("State law establishes the required showing for attorney's fees in an action in diversity.").

### 26 **C. Representative Enhancement**

27 "[N]amed plaintiffs, as opposed to designated class members who are not named  
 28 plaintiffs, are eligible for reasonable incentive payments." *Staton*, 327 F.3d at 977. It is within

1 the Court's discretion to grant such an award. *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454,  
2 463 (9th Cir. 2000). These awards "are intended to compensate class representatives for work  
3 done on behalf of the class, to make up for financial or reputational risk undertaken in bringing  
4 the action, and, sometimes, to recognize their willingness to act as a private attorney general.  
5 Awards are generally sought after a settlement or verdict has been achieved." *Rodriguez*, 563  
6 F.3d at 958-59.

### 7 **III. The Court's Special Obligation**

8 The proposed settlement contains certain features which the Court finds troubling.

9 As the Court indicated at the Fairness Hearing, it takes seriously its obligation to  
10 independently ensure that the settlement—including the requested attorney's fees—is fair,  
11 reasonable, and adequate. This duty compels the Court to "look for 'subtle signs that class  
12 counsel have allowed pursuit of their own self-interests . . . to infect the negotiations.'" *Allen*,  
13 787 F.3d at 1224. In *Allen*, the Ninth Circuit reiterated three such subtle signs: "(1) 'when  
14 counsel receive a disproportionate distribution of the settlement;' (2) 'when the parties  
15 negotiate a 'clear sailing' arrangement' (i.e., an arrangement where defendant will not object to  
16 a certain fee request by class counsel); and (3) when the parties create a reverter that returns  
17 unclaimed fees to the defendant." *Id.* (quoting *In re Bluetooth*, 654 F.3d at 947). The Court is  
18 concerned that each of these factors appears to be present in the proposed settlement.

19 The proposed settlement is a "claims-made" settlement, which "is a settlement that does  
20 not have a fixed settlement fund, but rather provides that the defendant will pay claims of class  
21 members who file them, usually up to some fixed ceiling." 4 William B. Rubenstein et al.,  
22 *Newberg on Class Actions* ("Newberg") § 13:7 (5th ed.). As to proportionality, courts are split  
23 on whether, in claims-made settlements, attorney's fees should be viewed as a percentage of the  
24 total amount available to the class or the smaller amount actually claimed by the class. *See id.*  
25 (citing cases). Class counsel argue that fees should be viewed as a percentage of the maximum  
26 amount of funds potentially available to the class. They argue that the requested award of  
27 \$4,188,981.61 is only 10% of the total "maximum value" of the settlement, which they assert is  
28



1 \$42.25 million—that is, \$35,750,000 (\$55 per class member × 650,000 class members) +  
2 \$6,500,000 (\$4,188,981.61 in fees + \$2,311,018.39 in costs). The Court does not agree.

3 The problem with class counsel’s comparison is that it distorts the reality of the *actual*  
4 payment that BSH will make to the class. *Allen* supports the view that proportionality should be  
5 determined with reference to the actual amount paid to the class. In *Allen*, the settlement  
6 created a maximum fund of \$4.5 million and class counsel sought, and was awarded, a fee  
7 representing 25% of that amount. *Allen*, 787 F.3d at 1221. However, less than 8% of the class  
8 submitted timely claims and thus only a maximum of \$373,675 would be disbursed to the class.  
9 *Id.* at 1224 n.4. In reversing, the Ninth Circuit expressed its concern that the fee award  
10 exceeded the actual amount that would be paid to the class by a factor of three. *Id.* at 1224.

11 At the Fairness Hearing, class counsel represented that, as of the close of business on  
12 June 5, 2015, 19,469 class members, or approximately 3% of the class, submitted claims. Based  
13 on that claims rate, BSH will pay a total of \$1,070,795 to class members—assuming all claims  
14 are determined to be valid. The amount of requested attorney’s fees (\$4,188,981.61) is  
15 approximately four times the maximum amount that will actually be paid to the class. Thus, the  
16 same proportionality concern identified in *Allen* is present here.

17 The proposed settlement also contains a “clear sailing” provision, whereby BSH agreed  
18 not to object to class counsel seeking attorney’s fees and costs of \$6.5 million or less. *See*  
19 *Newberg* § 13:7 (combination of a claims-made settlement with a clear sailing provision  
20 “makes it appear as if class counsel agreed to a low defendant liability in exchange for an easy  
21 fee”).

22 Class counsel argue that the settlement does not provide for a reversion of funds to BSH.  
23 Although the claims-made settlement does not contain a reverter provision, “[a] claims-made  
24 settlement is . . . the functional equivalent of a common fund settlement where the unclaimed  
25 funds revert to the defendant.” *Newberg* § 13:7 (reversionary fund settlements and claims-made  
26 settlements “are fully synonymous”).

27 As the *Allen* court stated, the existence of red flags “does not mean the settlement cannot  
28 still be fair, reasonable, or adequate.” *Allen*, 787 F.3d at 1224. However, especially in light of



1 the troubling features of the proposed settlement, the Court has “a special obligat[ion] to assure  
2 itself” that the settlement is fair, reasonable, and adequate and “that the fees awarded in the  
3 agreement [are] not unreasonably high.” *Id.* (internal quotation marks omitted; first alteration in  
4 original).

5 With this special obligation in mind, the Court proceeds to address the adequacy of the  
6 settlement.

#### 7 **IV. Adequacy of Settlement**

8 The Court assesses the adequacy of the settlement in light of the *Churchill Village*  
9 factors. *See Churchill Vill.*, 361 F.3d at 575.

##### 10 **A. Strength of Plaintiffs’ Case**

11 Most of Plaintiffs’ claims survived a motion to dismiss (Plaintiffs’ express warranty  
12 claims under the Uniform Commercial Code and the Song Beverly Act were dismissed without  
13 leave to amend). Classes for four states were certified. BSH’s pending summary judgment  
14 motion sought to eliminate the claims of a significant subset of the certified classes. BSH also  
15 had pending motions to decertify the classes and *Daubert* motions challenging Plaintiffs’  
16 experts on damages, defective design, and consumer complaints. These motions presented  
17 serious hurdles for Plaintiffs. Additionally, in the *Whirlpool* action, which involved similar  
18 claims of front-loading washing machines having a propensity to develop BMFO, a jury trial  
19 resulted in a unanimous defense verdict. Although Plaintiffs’ claims were strong enough to  
20 survive a motion to dismiss, they had many evidentiary weaknesses.

##### 21 **B. Risk, Expense, Complexity**

22 Even if Plaintiffs could be certain their claims would survive the pending motions and  
23 they would obtain a favorable verdict, defending that verdict on appeal would pose its own set  
24 of challenges. This case has already been through a round of appeals, and given the procedural  
25 history, further appeals can likely be expected if the case were to proceed in active litigation.  
26 The value of any judgment would therefore be discounted by the delay the class members  
27 would face in actually obtaining that judgment. By contrast, the proposed settlement provides  
28 certain, timely, and substantial relief. *See Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D.

482, 489 (E.D. Cal. 2010) (in weighing the risk of future litigation, “a court may consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation”) (internal quotation marks omitted).

### **C. Risk of Maintaining Class Action Status**

Maintaining class action status itself was significantly at risk. Even as to the certified classes of consumers in California, Illinois, New York, and Maryland, maintaining certification through trial was not guaranteed in light of BSH’s pending decertification motion and the expected appeals of any final class certification order. *Cf. McKenzie v. Fed. Exp. Corp.*, 2012 WL 2930201, at \*4 (C.D. Cal. July 2, 2012) (even though class had been certified and defendant’s motion for reconsideration of the certification decision had been denied, third *Churchill Village* factor weighed in favor of final approval because “settlement avoids all possible risk”).

### **D. Amount Offered in Settlement**

The settlement makes all nationwide class members eligible to receive a \$55 cash payment. For comparison, Plaintiffs’ per-washer damages estimates ranged from \$113 to \$396, depending on the methodology employed. Plaintiffs’ only damages model that BSH conceded could be a valid classwide measure—the price elevation model—estimated damages of \$113 per washer. The potential recovery is nearly half of that figure.

Class counsel characterizes the settlement as creating a maximum value of \$35.75 million ( $\$55 \times 650,000$  class members). As discussed above, this “maximum value” is somewhat illusory. *See Pearson v. NBTY, Inc.*, 772 F.3d 778, 781 (7th Cir. 2014) (“The \$14.2 million ‘benefit’ to the class members was a fiction . . . Only 30,245 claims were filed, yielding total compensation for the class members of less than \$1 million.”). A case like this one presents challenges to actually notifying all class members and making sure that they all submit claims. It is patently unrealistic to expect that all—or close to all—class members would submit a claim. *See In re TJX Companies Retail Sec. Breach Litig.*, 584 F. Supp. 2d 395, 405

(D. Mass. 2008) (“[I]n . . . a claims-made settlement, the defendant is likely to bear only a fraction of the liability to which it agrees.”).

In fact, at the Fairness Hearing, class counsel represented that only 19,469 class members (or approximately 3% of the nationwide class) submitted claims. Assuming each of these claims are determined valid and paid, the total payout to the class will only be \$1,070,795. This economic reality should be taken into account when assessing the adequacy of the settlement. *See Parker v. Time Warner Entm't Co., L.P.*, 631 F. Supp. 2d 242, 267 (E.D.N.Y. 2009) (“[T]he settlement should be valued on the basis of the number of claims that were made against it[.]”); Fed. Jud. Ctr., *Managing Class Action Litigation: A Pocket Guide for Judges* at 13 (3d ed. 2010) (advising courts reviewing settlements to obtain information about “the number of claims actually filed by class members” and “the amount of the settlement that is likely to be distributed to class members”); *see id.* at 16 (“Your appraisal of the settlement should focus on the value actually distributed to the class—based on the number and percentage of class members who have filed a claim.”); Nicholas M. Pace & William B. Rubenstein, *How Transparent are Class Action Outcomes? Empirical Research on the Availability of Class Action Claims Data* 39 (RAND Institute for Civil Justice 2008) (“As part of demonstrating the amount accorded to the class, the parties should have to estimate the proportion of class members likely to make claims and the likely average amount of such claims. . . . In short, the numbers should be transparent and they should add up.”).

Although only 3% of class members submitted claims, all class members—besides the approximately 30 who opted out—are releasing their claims against BSH. Put another way, the proposed settlement buys a release from approximately 650,000 class members for the price of \$1.65 per class member ( $\$55 \times 19,469 \text{ claims submitted} \div 650,000 \text{ class members}$ ). *See Pearson*, 772 F.3d at 783-84 (where class members were eligible to receive up to \$12 without proof of purchase and up to \$50 with proof of purchase, the actual payment to class members spread across the entire class was “only 7 cents apiece”). Quantifying the settlement as a function of the actual claims is much more meaningful—and accurate—than class counsel’s version of the “maximum value” of the settlement (\$35.75 million).

1           Nevertheless, the Court recognizes that the \$1.65 figure does not tell the whole story. In  
2 the settlement, BSH agreed to pay \$55 for all valid claims made. Although competent and  
3 experienced counsel for both sides could not have believed all class members would submit  
4 claims, *see In re TJX Companies Retail Sec. Breach Litig.*, 584 F. Supp. 2d 395, 405 (D. Mass.  
5 2008) (stating “attorneys for each side bargain knowing that” in “a claims-made settlement, the  
6 defendant is likely to bear only a fraction of the liability to which it agrees”), a claims rate  
7 somewhat above 3% was likely a realistic possibility, *see Sylvester v. CIGNA Corp.*, 369 F.  
8 Supp. 2d 34, 52 (D. Me. 2005) (“‘[C]laims made’ settlements regularly yield response rates of  
9 10 percent or less.”). BSH’s agreement up front to be on the hook for all valid claims is worth  
10 something greater than simply the value of the actual payment that will be made to class  
11 members.

12           Unlike class counsel, the Court thus cannot call the settlement “an excellent result” for  
13 the class. That said, “[t]he fact that a proposed settlement may only amount to a fraction of the  
14 potential recovery does not, in and of itself, mean that the proposed settlement is grossly  
15 inadequate and should be disapproved.” *Linney v. Cellular Alaska P’ship*, 151 F.3d 1234, 1242  
16 (9th Cir. 1998) (internal quotation marks omitted).

#### 17           **E.     Extent of Discovery Completed and the Stage of Proceedings**

18           The settlement was reached two months before trial was set to commence and only after  
19 extensive fact discovery, expert discovery, and motions practice. The first mediation took place  
20 after the four classes were certified and after substantial fact and class-related expert discovery.  
21 The second mediation took place nine months later, by which time the parties had conducted  
22 additional fact discovery, deposed each other’s experts, and filed opening and responding briefs  
23 to BSH’s summary judgment motion. Following the second mediation, the parties resumed  
24 active litigation, including trial preparation and ongoing briefing related to summary judgment,  
25 BSH’s decertification motion, and *Daubert* challenges.

26           This is certainly a case where both parties had ample time and information to evaluate  
27 all aspects of the case, the strength of the factual and legal questions at issue, and the likelihood  
28 of prevailing.

**F. Experience and Views of Counsel**

Counsel on both sides of this case are experienced litigators. Class counsel competently investigated and litigated the factual and legal issues raised in this action, and they wholeheartedly endorse the settlement as fair, reasonable, and adequate. *See* Sagafi Decl. ¶¶ 23-24. In light of the problematic incentives inherent in agreements like the one before the Court, however, the views of counsel are not given significant weight.

**G. Presence of a Governmental Participant**

There is no governmental participant in this action.

**H. Reaction of Members of the Proposed Settlement**

All class representatives, who actively participated in this litigation, endorse the settlement. *See* Declaration of Beverly Gibson (Dkt. 372-2); Declaration of Dennis Demereckis (Dkt. 372-3); Declaration of Nancy Wentworth (Dkt. 372-4); Declaration of Trish Isabella (Dkt. 373-5). As of the deadline for objecting to or opting out of the settlement (April 30, 2015), the claims administrator received 30 opt-outs (0.005% of the total class).

The following class members objected to the adequacy of the settlement: Roger Kerr, Robert and Robin Munoz, Jeffrey Rudy, and Bobby Ameen.<sup>2</sup> One objector, for example, called the \$55 payment a “miniscule settlement amount . . . in comparison [with] the outlay of funds we were forced to make.” Another objector states that “[t]he \$55.00 settlement seems ridiculous, and sort of a slap in the face.”

The flaw with each of the objections to the adequacy of the settlement is that the objectors consider only the amount of their asserted damages and ignore both the costs and risks of litigation.

**I. Settlement Procedure**

In addition to the factors enumerated in *Churchill Village*, the Court finds it appropriate to consider the procedure by which the parties arrived at the settlement to determine whether

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<sup>2</sup> Carole Manuwa initially objected to the claims procedure but later withdrew her objection. Charles Moore submitted an objection because he contends that BSH did nothing wrong. Because he does not contend that the settlement is inadequate or unfair to the class, the Court does not address his objection any further.

1 the settlement is truly the product of arm's length bargaining, rather than the product of  
2 collusion or fraud. *See Chun-Hoon*, 716 F. Supp. 2d at 851; *Van Ba Ma v. Covidien Holding,*  
3 *Inc.*, 2014 WL 2472316, at \*2 (C.D. Cal. May 30, 2014).

4 The parties engaged in two mediations with well-respected former judges: the Honorable  
5 Daniel S. Pratt (Ret.) and the Honorable Dickran Tevrizian (Ret.). In a declaration in support of  
6 final approval of the settlement, Judge Tevrizian stated that "the negotiations were intense,  
7 arms-length, non-collusive, and contentious." Tevrizian Decl. ¶ 6.

#### 8 **J. Conclusion**

9 In weighing the factors listed above, the Court cannot agree with class counsel's  
10 characterization of the settlement as being an "excellent result for the Class." However,  
11 particularly in light of the significant risks Plaintiffs would face going forward in the case, the  
12 Court finds that the settlement is fair, adequate, and reasonable. *See* Fed. R. Civ. P. 23(e)(2).  
13 And, although the settlement contains features that are less than ideal, the Court finds that the  
14 settlement "is not the product of fraud or overreaching by, or collusion between, the negotiating  
15 parties." *See Rodriguez*, 563 F.3d at 965 (internal quotation marks omitted). Rather, the less  
16 than remarkable result reflects the serious obstacles to victory Plaintiffs would have faced if the  
17 case proceeded.

#### 18 **V. Attorney's Fees**

19 Class counsel seeks to recover attorney's fees of \$4,188,981.61.

20 "In a certified class action, the court may award reasonable attorney's fees and  
21 nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h).  
22 "Because there is no agreement regarding fees, the Court, sitting in diversity adjudicating state  
23 law claims, turns to applicable California law." *Parkinson v. Hyundai Motor Am.*, 796 F. Supp.  
24 2d 1160, 1169 (C.D. Cal. 2010); *see also Mangold v. California Pub. Utils. Comm'n*, 67 F.3d  
25 1470, 1478–79 (9th Cir. 1995) ("The method of calculating a fee is an inherent part of the  
26 substantive right to the fee itself, and a state right to an attorneys' fee reflects a substantial  
27 policy of the state.").

1 “Under Cal. Civ. Code § 1780(e), a prevailing plaintiff in an action under the CLRA is  
2 entitled to an award of costs and attorneys’ fees.” *Parkinson*, 796 F. Supp. 2d at 1169. A  
3 plaintiff is a “prevailing plaintiff” under the CLRA when, because of a judgment or settlement,  
4 “he obtain[s] a net monetary recovery or . . . he achieve[s] most or all of what he wanted by  
5 filing the action or a combination of the two.” *Kim v. Euromotors W./The Auto Gallery*, 149  
6 Cal. App. 4th 170, 181 (2007). Plaintiffs in this case qualify as “prevailing plaintiff[s]” because  
7 of the monetary recovery provided by the settlement.

8 **A. Method of Calculating Fees**

9 “Courts recognize two methods for calculating attorney fees in civil class actions: the  
10 lodestar/multiplier method and the percentage of recovery method.” *Wershba v. Apple*  
11 *Computer, Inc.*, 91 Cal. App. 4th 224, 254 (2001). Courts have discretion to determine which  
12 method of calculation to choose. *See, e.g., In re Bluetooth*, 654 F.3d at 940; *In re Consumer*  
13 *Privacy Cases*, 175 Cal. App. 4th 545, 558 (2009) (“It is not an abuse of discretion to choose  
14 one method over another as long as the method chosen is applied consistently using percentage  
15 figures that accurately reflect the marketplace.”). “Regardless of whether attorneys’ fees are  
16 determined using the lodestar method or awarded based on a ‘percentage-of-the-benefit’  
17 analysis under the common fund doctrine, [t]he ultimate goal . . . is the award of a ‘reasonable’  
18 fee to compensate counsel for their efforts, irrespective of the method of calculation.” *In re*  
19 *Consumer Privacy Cases*, 175 Cal. App. 4th at 557-58 (internal quotation marks omitted)  
20 (alterations in original). Especially in a class action, “the district court must exercise its inherent  
21 authority to assure that the amount and mode of payment of attorneys’ fees are fair and proper.”  
22 *Zucker v. Occidental Petroleum Corp.*, 192 F.3d 1323, 1328-29 (9th Cir. 1999); *accord Staton*,  
23 327 F.3d at 963-64.

24 The Court briefly discusses the rationale behind the two respective methods of  
25 calculation before selecting the appropriate method for this case.

26 **1. Lodestar**

27 “Generally, litigants in the United States pay their own attorneys’ fees, regardless of the  
28 outcome of the proceedings.” *Staton*, 327 F.3d at 965. However, “in certain cases prevailing



1 parties may recover their attorneys' fees from the opposing side. When a statute provides for  
2 such fees, it is termed a 'fee-shifting' statute." *Id.* Under California law, "[i]n so-called 'fee  
3 shifting' cases . . . the primary method for establishing the amount of 'reasonable' attorney fees  
4 is the lodestar method." *Lealao v. Beneficial California, Inc.*, 82 Cal. App. 4th 19, 26 (2000);  
5 *see also Staton*, 327 F.3d at 965 ("Under a fee-shifting statute, the court 'must calculate awards  
6 for attorneys' fees using the 'lodestar' method' . . . ."); *Apple Computer, Inc. v. Superior*  
7 *Court*, 126 Cal. App. 4th 1253, 1270 (2005) (attorney's fees "under a fee-shifting statute are  
8 determined using the lodestar method"). The laws of New York, Maryland, and Illinois are in  
9 accord. *See Douyon v. NY Med. Health Care, P.C.*, 49 F. Supp. 3d 328, 340 (E.D.N.Y. 2014)  
10 (using lodestar method to calculate fees in case brought under New York's consumer protection  
11 statute and the Fair Debt Collection Practices Act); *Hyundai Motor Am. v. Alley*, 960 A.2d  
12 1257, 1265 (2008) ("In determining an award under Maryland fee-shifting statutes, courts  
13 employ the lodestar methodology.") *Demitro v. Gen. Motors Acceptance Corp.*, 388 Ill. App.  
14 3d 15, 25 (2009) (affirming award of attorney's fees calculated using lodestar method in case  
15 brought under Illinois's Consumer Fraud Act).

16 "[The lodestar] figure is calculated by multiplying the number of hours the prevailing  
17 party reasonably expended on the litigation (as supported by adequate documentation) by a  
18 reasonable hourly rate for the region and for the experience of the lawyer." *In re Bluetooth*, 654  
19 F.3d at 941. "Once the court has fixed the lodestar, it may increase or decrease that amount by  
20 applying a positive or negative 'multiplier' to take into account a variety of other factors,  
21 including the quality of the representation, the novelty and complexity of the issues, the results  
22 obtained, and the contingent risk presented." *Lealao*, 82 Cal. App. 4th at 26.

## 23 **2. Percentage of Recovery**

24 Another method of calculating reasonable attorney's fees is the percentage-of-recovery  
25 approach, which is based on the common fund doctrine. Under this doctrine, "a private  
26 plaintiff, or his attorney, whose efforts create, discover, increase or preserve a fund to which  
27 others also have a claim is entitled to recover from the fund the costs of his litigation, including  
28 attorneys' fees." *Vincent v. Hughes Air W., Inc.*, 557 F.2d 759, 769 (9th Cir. 1977). "This rule

1 . . . is designed to prevent unjust enrichment by distributing the costs of litigation among those  
2 who benefit from the efforts of the litigants and their counsel.” *In re Omnivision Tech., Inc.*,  
3 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008) (citing *Paul, Johnson, Alston, & Hunt v. Gaulty*,  
4 886 F.2d 268, 271 (9th Cir. 1989)). “Under regular common fund procedure, the parties settle  
5 for the total amount of the common fund and shift the fund to the court’s supervision. The  
6 plaintiffs’ lawyers then apply to the court for a fee award from the fund.” *Staton*, 327 F.3d at  
7 969.

8 In common fund cases, the “benchmark” percentage award is 25 percent of the recovery  
9 obtained, with 20 to 30 percent as the usual range. *See, e.g., Vizcaino v. Microsoft Corp.*, 290  
10 F.3d 1043, 1047 (9th Cir. 2002). The “benchmark” is the starting point for the analysis, and the  
11 ultimate amount must be supported by findings that take into account all of the circumstances  
12 of the case, including the result achieved, the risk involved in the litigation, the skill required  
13 and quality of work by counsel, the contingent nature of the fee, awards made in similar cases,  
14 and the lodestar crosscheck. *Id.* at 1048-50.

15 There are significant benefits to the percentage approach, including consistency with  
16 contingency fee calculations in the private market, aligning the lawyers’ interests with  
17 achieving the highest award for the class members, and reducing the burden on the courts that a  
18 complex lodestar calculation requires. *See In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1374-  
19 77 (N.D. Cal. 1989).

### 20 3. Selection of Method of Calculation

21 Class counsel argue that the Court should calculate reasonable attorney’s fees using the  
22 lodestar method. They spent over 18,000 hours litigating this case and assert a lodestar of  
23 \$9,265,612.75. In contrast, if the percentage of recovery method is used, the starting point for  
24 determining class counsel’s reasonable fees would likely be around \$300,000 to \$400,000.

25 For three primary reasons, the Court finds it appropriate to calculate reasonable  
26 attorney’s fees in this case using the lodestar method.

27 First, Plaintiffs’ consumer protection claims are based on fee-shifting statutes. *See In re*  
28 *Bluetooth*, 654 F.3d at 941 (“The ‘lodestar method’ is appropriate in class actions brought

1 under fee-shifting statutes . . .”). California, New York, Illinois, and Maryland—the four  
2 states for which classes were previously certified—all have statutes authorizing or requiring fee  
3 shifting in favor of the prevailing party. *See* Cal. Civ. Code § 1780(e); N.Y. Gen. Bus. Law  
4 § 349(h); 815 Ill. Comp. Stat. Ann. 505/10a; Md. Code Ann., Com. Law § 13-408.

5 Second, this is not a common fund case. Unlike in a common fund settlement, whatever  
6 amount of fees is awarded to class counsel, it will not affect the amount going to class  
7 members. *See In re Consumer Privacy Cases*, 175 Cal. App. at 557 (“[A] fee award may not be  
8 justified solely as a percentage of the recovery when that award will not come from the  
9 settlement fund.”).

10 Third, although calculation of the lodestar amount focuses on class counsel’s billing  
11 time and billing rate, other factors are considered both in calculating the lodestar and in  
12 determining whether to apply a multiplier (negative or positive). *See Kerr v. Screen Extras*  
13 *Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975) (listing several factors). Thus, the amount of  
14 recovery to the class will be factored into the determination of class counsel’s reasonable fee.  
15 *See Morales v. City of San Rafael*, 96 F.3d 359, 364 (9th Cir. 1996) (“The district court was not  
16 only free but obligated to consider ‘the results obtained’ by [the plaintiff], or ‘the extent of [his]  
17 success,’ in calculating the lodestar figure.” (internal citation omitted)).

## 18 **B. Calculating Class Counsel’s Lodestar**

19 Plaintiffs’ exhibits show that class counsel spent more than 18,730 hours in this case. At  
20 the Fairness Hearing, counsel for BSH represented that the amount of time put in by his firm  
21 was “in parallel” with the time spent by class counsel. At the Court’s request, class counsel  
22 submitted detailed billing records. From its review of the billing records, the Court finds that, in  
23 general, the time and rates billed by class counsel is reasonable. However, the Court has  
24 identified a number of problems affecting the reasonableness of hours billed and billing rates  
25 for some attorneys/staff.

### 26 **1. Block Billing**

27 Many of class counsel’s time entries “lump[ed] together multiple tasks, making it  
28 impossible to evaluate their reasonableness.” *Role Models Am., Inc. v. Brownlee*, 353 F.3d 962,

971 (D.C. Cir. 2004). Such “block billing makes it more difficult to determine how much time was spent on particular activities.” *Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 948 (9th Cir. 2007). The Court exercises its discretion to reduce block-billed time entries by 20%. *See id.* (approving reduction of block-billed time, but disapproving across-the-board reduction when not all hours were block billed). In total, class counsel block-billed 4,736.6 hours, which amount to \$1,875,194.17. Cutting these entries by 20% results in a reduction of \$375,788.83.

## 2. Hourly Rate

“In assessing a reasonable hourly rate for the lodestar figure, courts should consider the prevailing market rate in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.” *Rosenfeld v. U.S. Dep’t of Justice*, 903 F. Supp. 2d 859, 877 (N.D. Cal. 2012) (citing *Blum v. Stenson*, 465 U.S. 886, 895-96 (1984)).

“Generally, when determining a reasonable hourly rate, the relevant community is the forum in which the district court sits.” *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 979 (9th Cir. 2008). “Affidavits of the plaintiffs’ attorney and other attorneys regarding prevailing fees in the community, and rate determinations in other cases, particularly those setting a rate for the plaintiffs’ attorney, are satisfactory evidence of the prevailing market rate.” *United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990). Class counsel, as the fee applicant, bear the burden of “produc[ing] satisfactory evidence—in addition to the attorney’s own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.” *Blum*, 465 U.S. at 896 n.11.

The billing rates of the attorneys and staff who worked on this case varied as follows: \$490 to \$995 per hour for partners; \$300 to \$800 per hour for associates; and \$130 to \$425 for paralegals and administrative staff. The Court finds that some of the rates billed by individual attorneys are unreasonably high. In calculating class counsel’s lodestar, the Court reduces the billing rate of partner time to a maximum of \$800 per hour, associate time to a maximum of \$550 per hour, and paralegal time to a maximum of \$225 per hour. *See Vinh Nguyen v. Radient Pharm. Corp.*, 2014 WL 1802293, at \*11 (C.D. Cal. May 6, 2014) (approving rates up to \$750

per hour for partners, \$550 per hour for associates, and \$225 per hour for paralegals). This adjustment to class counsel's billing rates reduces their asserted lodestar by \$290,726.50.

Additionally, in some instances, the stated billing rate was unreasonable in light of the task performed. For example, class counsel billed at a partner's rate of \$710 to \$950 per hour for tasks such as: "prepare judge's courtesy copies [of court filing]"; "search offsite storage files for Castillo depo transcript"; "scan Castillo Deposition transcript and errata and email to co-counsel"; "arrange interpreter [for deposition]"; "schedule inspections"; "Administration of the case"; and "Administrate bills and expenses." The Court reduces the rate for these and other similar tasks to either an associate or paralegal rate, depending on the task, resulting in a net reduction of \$62,333.50 for all such entries.

### **3. Overly Vague Entries**

Many of class counsel's billing entries were so vague as to prevent the Court from assessing the reasonableness of the time and rate billed. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) ("Where the documentation of hours is inadequate, the district court may reduce the award accordingly."); *Rosenfeld*, 903 F. Supp. 2d at 876 ("The vagueness of certain documents included in Plaintiff's time records make it difficult for this Court to assess whether the time claimed was reasonably spent on this matter."). Examples of such overly vague entries include: "review docs" (several entries); "email" (1.0 hours); "certificate" (1.0 hours); "brief" (6.0 hours); "Review background materials" (8.0 hours); "Expert work" (several entries including one for 10.0 hours); "Conduct document review and analysis" (several all-day entries totaling nearly 500 hours); and "Read and summarize deposition" (several all-day entries totaling 236 hours). These entries are of particular concern to the Court given the large number of hours spent by class counsel in this case. For example, in light of class counsel's fairly detailed billing entries covering thousands of hours devoted to expert-related work, the Court cannot conclude that the additional dozens of hours vaguely described as "expert work" (or something similar) is reasonable. Giving class counsel the benefit of the doubt on these vague entries, the Court cuts them by 50%, resulting in a total reduction of \$206,699.75.

1 The Court also made reductions where the time spent was unreasonable, a task was  
2 unnecessarily overstaffed, or the task is not billable. For example, 36.5 hours were billed to  
3 summarizing a single deposition. The Court finds this amount unreasonable and cuts it to 16  
4 hours. This category includes reductions totaling \$48,334.50.

#### 5 **4. Billing by the Quarter-Hour**

6 One of the law firms, WeissLaw LLP, billed its time in quarter-hour increments.  
7 Although that practice is not unreasonable per se, the Court finds it resulted in time counted for  
8 hours not reasonably expended on this litigation. Some—but not all—of WeissLaw’s attorneys  
9 and staff have several quarter-hour and half-hour entries for tasks, such as reviewing and  
10 drafting emails and other correspondence, that likely took only a portion of the time billed. *See*  
11 *Welch*, 480 F.3d at 949 (affirming district court’s finding that “hours were inflated because  
12 counsel billed a minimum of 15 minutes for numerous phone calls and e-mails that likely took  
13 a fraction of the time”). The majority of the billing entries of attorney Joseph H. Weiss and  
14 paralegal LaDonna R. McDuffie are quarter-hour or half-hour tasks and the Court reduces their  
15 billed time by 20%. *See id.* (affirming across-the-board reduction of hours billed in quarter-  
16 hour increments). Attorneys Jordan L. Lurie and Leigh A. Parker also had several such  
17 entries—although not a majority—and the Court reduces their billed time by 10%. The Court  
18 does not reduce the hours of the other WeissLaw attorneys due to quarter-hour billing. In total,  
19 the Court’s reduction for quarter-hour billing is \$50,549.65.

20 Based on the Court’s review of class counsel’s billing records, and making the  
21 reductions discussed above, it calculates class counsel’s lodestar at \$8,498,409.02.

#### 22 **C. Adjustment to Lodestar**

23 Having calculated the lodestar, the Court now considers whether to increase or decrease  
24 that amount by applying a positive or negative multiplier in light of other factors, particularly  
25 the results obtained. *Lealao*, 82 Cal. App. 4th at 26; *Charlebois v. Angels Baseball LP*, 993 F.  
26 Supp. 2d 1109, 1115-16 (C.D. Cal. 2012) (“Adjustments to this presumptively reasonable  
27 amount may then be made based upon the factors set forth in *Kerr v. Screen Extras Guild, Inc.*,  
28



1 526 F.2d 67, 69-70 (9th Cir. 1975) to the extent that those factors are not reflected in the  
2 lodestar calculation.”).

3 “[W]here the plaintiff has achieved ‘only limited success,’ counting *all* hours expended  
4 on the litigation—even those reasonably spent—may produce an ‘excessive amount,’” and  
5 courts should “‘instead ‘award only that amount of fees that is reasonable in relation to the  
6 results obtained.’” *In re Bluetooth*, 654 F.3d at 942 (quoting *Hensley*, 461 U.S. at 436, 440); *see*  
7 *also McCown v. City of Fontana*, 565 F.3d 1097, 1101-02 (9th Cir. 2009) (“The reasonableness  
8 of the fee is determined primarily by reference to the level of success achieved by the  
9 plaintiff.”). One way of taking into account the results achieved is by cross checking the  
10 reasonableness of a fee with the percentage of recovery method. *Lealao*, 82 Cal. App. 4th at 50;  
11 *see also In re Bluetooth*, 654 F.3d at 944 (“[E]ven though the lodestar method may be a  
12 perfectly appropriate method of fee calculation, we have also encouraged courts to guard  
13 against an unreasonable result by cross-checking their calculations against a second method.”).

14 Here, the maximum *actual* payment that will be made to class members is \$1,070,795,  
15 or approximately \$1.65 per class member. As discussed above, this result for the class—though  
16 not remarkable—is not unreasonable in light of the significant risk of Plaintiffs losing their case  
17 altogether. However, in determining the reasonableness of class counsel’s fee, the maximum  
18 actual payment to the class undermines to a degree the reasonableness of the total amount of  
19 time spent by class counsel litigating this case. If this case is truly worth only \$1,070,795.00, or  
20 approximately \$1.65 per class member, is it reasonable for class counsel to have spent over  
21 18,000 hours (amounting to a claimed lodestar of \$9,532,841.75)? Probably not. *See Redman v.*  
22 *RadioShack Corp.*, 768 F.3d 622, 633 (7th Cir. 2014) (“[A]ttorneys’ fees don’t ride an escalator  
23 called risk into the financial stratosphere. Some cases should not be brought, because the  
24 litigation costs will exceed the stakes, and others are such long shots that prudent counsel will  
25 cut his expenditure in litigating them of time, effort, and money to the bone.”).

26 Using the percentage of recovery method as a cross check, it is clear the unadjusted  
27 lodestar dwarfs the class’s recovery, suggesting a negative multiplier is appropriate. The only  
28 question is how much of a negative multiplier.



1 Here, class counsel's lodestar with no multiplier (\$8,498,409.02) is a whopping 7.8  
2 times the maximum amount that will be going to class members \$1,090,795.00 (class payment  
3 plus incentive awards. *See Pearson*, 772 F.3d at 781 (rejecting the requested fees because they  
4 were "an outlandish 69 percent" of the aggregate value). Class counsel—no doubt aware that  
5 their lodestar would dwarf the amount of actual recovery to class members—were wise to  
6 request a fee amounting to a significant reduction of their lodestar. Class counsel request a fee  
7 of \$4,188,981.61, or a negative multiplier of approximately 0.5 of the unadjusted lodestar. The  
8 requested fees are 3.8 times the amount going to the class.

9 The Seventh Circuit recently suggested that "in consumer class actions, where the  
10 percentage of class members who file claims is often quite low . . . the presumption should . . .  
11 be that attorneys' fees awarded to class counsel should not exceed a third or at most a half of  
12 the total amount of money going to class members and their counsel." *Pearson*, 772 F.3d at 782  
13 (citation omitted). Although the Ninth Circuit has stated that "the benefit obtained for the class"  
14 is "[f]oremost among the[] considerations" relevant to an upward or downward adjustment of  
15 the lodestar, *In re Bluetooth*, 654 F.3d at 941-42, it has not set a mandatory not-to-exceed  
16 percentage when using the percentage of recovery method as a cross check.

17 The amount of fees requested by class counsel likely could not be justified under a  
18 percentage of recovery calculation. However, "[b]ecause," in a fee-shifting case, "the lodestar  
19 award is de-coupled from the class recovery, the lodestar assures counsel undertaking socially  
20 beneficial litigation (as legislatively identified by the statutory fee shifting provision) an  
21 adequate fee irrespective of the monetary value of the final relief achieved for the class." *In re*  
22 *Gen. Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig.*, 55 F.3d 768, 821 (3d Cir.  
23 1995).

24 The Court believes the requested fee of \$4,188,981.61, which is a negative multiplier of  
25 approximately 0.5 of the unadjusted lodestar, adequately takes into account the results achieved  
26 for the class. In light of the circumstances of this case—which can fairly be described as hotly  
27 contested litigation, spanning over five years, including an appeal in the Ninth Circuit and  
28

petition for review in the Supreme Court—as well as the policy underlying fee-shifting statutes, the Court finds the requested amount of attorney’s fees (\$4,188,981.61) is reasonable.

#### **D. Objections to Attorney’s Fees**

Some of the objectors argue the requested attorney’s fees are unreasonable. The thrust of these arguments are that the reasonableness of the fees should be determined by comparison to the actual amount that will be paid to class members (that is, \$1,070,795 based on a 3% claims rate), not to the “fictional” figure of \$35,750,000 that assumes a 100% claims rate. Objector Bobby Ameen argues the fee is unreasonable if it is more than 40% of the actual payout to the class. As discussed above, the Court agrees with the contention that the actual payout to the class must be considered in determining reasonable attorney’s fees. However, comparing the requested fee to the actual payout does not necessarily lead to the conclusion that the requested fee is unreasonable. As discussed above, the Court finds it appropriate to calculate fees using the lodestar method with a percentage of recovery cross check.

The Court thus overrules the objections, and GRANTS the motion as to attorney’s fees.

#### **VI. Legal Costs**

Class counsel also request costs of \$2,311,018.39. The vast majority of these expenses was incurred through expert opinions and testimony. The balance of the expenses includes court fees, discovery costs, travel costs, copying costs, mailing costs, and so forth. In light of the length of this litigation, the importance of expert testimony, and the number of experts on both sides (a total of 21), the Court finds these costs reasonably incurred and GRANTS the motion as to costs.

#### **VII. Class Representative Award**

Class counsel also request an award to the class representatives of \$5,000 each (a total of \$20,000).

It is common in class action cases to provide incentive awards to named plaintiffs. *See Newberg* § 11:38 (4th ed. 2008).

Over the course of this lengthy litigation, the named plaintiffs each participated in day-long depositions, made their washers available for inspections, participated in day-long

1 inspections of their homes, and answered discovery. BSH agreed to pay these incentive awards  
2 and such payment will not diminish the payment to be made to other class members. The Court  
3 finds that the enhancement awards requested in this case are reasonable and appropriate. *See In*  
4 *re Toys R Us-Delaware, Inc —Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295  
5 F.R.D. 438, 472 (C.D. Cal. 2014) (approving \$5,000 incentive award); *Faigman v. AT & T*  
6 *Mobility LLC*, No. C06–04622 MHP, 2011 WL 672648, \*5 (N.D. Cal. Feb. 16, 2011)  
7 (approving incentive payment of \$3,333.33 and noting that “[i]n [the Northern] [D]istrict,  
8 incentive payments of \$5,000 are presumptively reasonable”).

9 The Court therefore GRANTS the request for incentive awards of \$5,000 for lead  
10 plaintiffs Dennis Demereckis, Beverly Gibson, Trish Isabella, and Nancy Wentworth.

11 **VIII. Disposition**

12 The Court GRANTS the Motion for Final Approval (Dkt. 373). The objections to the  
13 settlement are overruled.

14 The Court GRANTS the Motion for Fees (Dkt. 372), and awards class counsel  
15 attorney’s fees of \$4,188,981.61 and reimbursement of costs totaling \$2,311,018.39. The  
16 objections to class counsel’s fees are overruled. The Court approves awards of \$5,000 for each  
17 of the four lead plaintiffs Dennis Demereckis, Beverly Gibson, Trish Isabella, and Nancy  
18 Wentworth.

19  
20 DATED: July 27, 2015

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22 

23 DAVID O. CARTER  
24 UNITED STATES DISTRICT JUDGE  
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